(13)

No. 00-1595-CFX Title: Hoffman Plastic Compounds, Inc., Petitioner
v.
National Labor Relations Board

Docketed: April 18, 2001 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Apr 16 2001	Petition for writ of certiorari filed. (Response due June 18, 2001)
	May 11 2001	Order extending time to file response to petition until June 18, 2001.
	Jun 18 2001	Brief of respondent National Labor Relations Board in opposition filed.
	Jul 3 2001	DISTRIBUTED for Conference of September 24, 2001
	Sep 25 2001	Petition GRANTED. SET FOR ARGUMENT January 15, 2002. **********
	Nov 9 2001	Joint appendix filed.
	Nov 9 2001	Brief of petitioner Hoffman Plastic Compounds, Inc. filed.
	Nov 9 2001	Brief amici curiae of Equal Employment Advisory Council and LPA, Inc. filed.
	Dec 3 2001	CIRCULATED.
	Dec 3 2001	Record filed.
	Dec 10 2001	Brief of respondent National Labor Relations Board filed.
	Dec 10 2001	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Dec 10 2001	Brief amicus curiae of Employers and Employer Organizations filed.
	Dec 10 2001	Brief amici curiae of New York, et al. filed.
	Dec 10 2001	Brief amicus curiae of AFL-CIO filed.
	Dec 10 2001	Brief amici curiae of National Employment Law Project, et al. filed.
	Jan 7 2002	Reply brief of petitioner Hoffman Plastic Compound, Inc. filed.
	Jan 15 2002	ARGUED.

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No.

IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an undocumented alien who—without his employer's knowledge—obtained employment by presenting his employer with fraudulent immigration documents, is entitled to backpay as compensation for a violation of the National Labor Relations Act if the undocumented alien never was legally authorized to work in the United States during the backpay period.

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no other parties or subsidiary companies which are required to be listed pursuant to Supreme Court Rule 29.6:

Petitioner herein:

Hoffman Plastic Compound, Inc.

Respondents herein:

National Labor Relations Board

Victoria E. Aguayo, Regional Director, Region 21, NLRB

Amicus Curiae below:

AFL-CIO

Other Interested Parties:

Samuel Perez (aka Jose Castro)

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No.

IN THE

Supreme Court of the United States

October Term, 2000

HOFFMAN PLASTIC COMPOUND, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The ruling of the United States Court of Appeals for the District of Columbia Circuit is reported as *Hoffman Plastic Compound, Inc. v. National Labor Relations Board*, 237 F.3d. 639 (D.C. Cir. 2001) (App. 1a). The ruling of the National Labor Relations Board is reported as *Hoffman Plastic Compounds, Inc. and Casimiro Arauz*, 326 N.L.R.B. 1060 (1998) (App. 78a). The decision of the administrative law judge is an attachment to 314 N.L.R.B. 683 (1994). (App. 88a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. (App. 98a).

STATUTES INVOLVED IN THIS CASE

8 U.S.C. § 1324a (App. 99a).

8 U.S.C. § 1324c (App. 102a).

8 U.S.C. § 1546(b) (App. 103a)

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The NLRB Decision

On January 31, 1989, Hoffman Plastic Compound, Inc. ("Hoffman") laid off several employees, including an employee known as "Jose Castro." The National Labor Relations Board ("NLRB") later determined that the layoff of these employees violated the National Labor Relations Act ("NLRA") and ordered Hoffman to offer reinstatement to each of the employees and to make them whole for any losses they incurred. The NLRB subsequently convened a compliance proceeding for purposes of determining backpay. There, the employee known to Hoffman only as "Jose Castro" falsely testified that Jose Castro was his true name. Then, he admitted that he was not a citizen of the United States and that he obtained employment at Hoffman by presenting a fraudulent birth certificate, an act made illegal by the immigration laws.

In November 1993, an administrative law judge issued a decision regarding backpay for "Jose Castro." The ALJ determined that Castro was not entitled to either reinstatement or backpay because, under *Sure-Tan v. NLRB*, 467 U.S. 883, 104 S. Ct. 2803 (1984), "backpay is tolled during any period when a discriminatee is not lawfully authorized to work in this country" and Castro never was lawfully authorized to work during the backpay period.

Nearly five years later, the NLRB reversed the ALJ's decision. On September 23, 1998, two members of a three-member Board panel decided that, notwithstanding the plain language of *Sure-Tan*, Castro was entitled to backpay from the

date of his layoff until June 14, 1993, when Hoffman first learned that Castro used fraudulent identification to obtain employment.

B. The Court of Appeals' Split Decisions

On December 2, 1998, Hoffman filed a Petition for Review of the Board's decision with the United States Court of Appeals for the District of Columbia Circuit, which had jurisdiction pursuant to 29 U.S.C. § 160(f). The NLRB subsequently filed a cross-application for the enforcement of its order. The Court of Appeals rendered its initial decision on March 17, 2000. In a 2-1 decision, the Court of Appeals affirmed the NLRB's backpay award to Castro.

Hoffman timely filed a Petition for Rehearing En Banc. The Court of Appeals granted that petition and vacated its earlier order. On January 16, 2001, the Court of Appeals issued another divided opinion. In a 5-4 decision, the Court of Appeals again narrowly affirmed the NLRB's backpay order to Castro even though Castro never was lawfully entitled to be present or employed in the United States during the backpay period.

For all of the reasons that follow, the majority decision issued by the Court of Appeals was erroneous and consideration by this Court is necessary.

THE REASONS FOR GRANTING THIS PETITION

In *Sure-Tan v. NLRB*, 467 U.S. 883, 104 S. Ct. 2803 (1984), this Court held that undocumented aliens who are not authorized to work in the United States during the backpay period are not entitled to backpay as compensation for a violation of the NLRA. Since *Sure-Tan*, four circuit courts of appeal have considered whether *Sure-Tan* prohibits an award of backpay to undocumented aliens. Despite the plain meaning of *Sure-Tan*, a conflict both between and within these circuit courts has developed regarding the proper interpretation of *Sure-Tan*.

In *Hoffman Plastic v. NLRB*, the District of Columbia Circuit added to the confusion by holding that, instead of prohibiting an award of backpay to undocumented aliens, *Sure-Tan* supports such backpay awards. This decision conflicts with this Court's decision in *Sure-Tan* and with the Immigration and Nationality Act ("INA") and the Immigration Reform and Control Act of 1986, as amended ("IRCA"). Accordingly, review by this Court is required to resolve the conflict between the circuits and to properly reconcile this country's immigration laws with this Court's holding in *Sure-Tan*.

A. Supreme Court Review Is Required To Resolve A Severe Conflict Among The Circuits As To The Meaning Of This Court's Holding In Sure-Tan And To Avoid A Direct Conflict With The Plain Language Of This Court's Decision

1. *Sure-Tan v. NLRB*

Whether undocumented aliens may recover backpay as compensation for an unlawful discharge was addressed by this Court in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803 (1984). In *Sure-Tan*, after a union was elected as the employees' collective bargaining representative and in an attempt to invalidate the election, the employer informed the Immigration and Naturalization Service ("INS") that several of the employees who voted for the union were undocumented aliens. 467 U.S. at 886. Upon threat of deportation, these employees voluntarily left the country. *Id.* at 887. The NLRB later concluded that the employer's report to the INS constituted an unfair labor practice. *Id.* at 888.

This Court agreed. *Id.* at 895-96. In considering the remedy to which the undocumented aliens *might* be entitled, the Court held that the Board's traditional remedies of reinstatement and backpay "must be conditioned upon the employees' legal readmittance to the United States." *Id.* at 902-03. With respect to backpay specifically, the Court stated that "the employees must be deemed '*unavailable*' *for work*

(and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903 [emphasis added].

In so holding, the Court recognized that the discharged employees would very likely be left without any remedy whatsoever:

> "We share the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period. The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify judicial arrogation of remedial authority not fairly encompassed within the Act." *Id.* at 904.

Although the language of this Court's *Sure-Tan* holding seems plain enough, every court of appeals to consider the issue since *Sure-Tan* has been forced to issue a divided opinion as to the Court's meaning, as has the NLRB. Most significantly, the Seventh Circuit reached a conclusion opposite to that of the District of Columbia Circuit, by a 2-1 vote in *Del Rey Tortilleria v. NLRB*, 976 F.2d 1115 (7th Cir. 1992). There, the Seventh Circuit held that undocumented alien workers who are discharged in violation of the NLRA are not entitled to backpay or reinstatement as a matter of law. After analyzing the *Sure-Tan* opinion at length, the Seventh Circuit concluded that the plain language of *Sure-Tan* barred undocumented aliens from receiving backpay:

> "The [*Sure-Tan*] Court seemed to determine that the policy behind the INA— 'the objective of deterring unauthorized immigration'—required the employees to show that they were lawfully available for employment during the backpay period. Otherwise,

> undocumented aliens would be rewarded by the NLRB for entering the United States illegally."

Id. at 1119. Accordingly, the Seventh Circuit held that the undocumented workers at issue were precluded from receiving backpay for "any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 1121 (citing *Sure-Tan*, 467 U.S. at 903).

Even those other courts of appeal that have agreed with the District of Columbia Circuit's interpretation of *Sure-Tan* have had to issue split decisions. *See Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (also known as *Felbro*) (2-1 decision); *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997) (2-1 decision). Indeed, the NLRB itself has been similarly divided, first holding in *Local 512* that the *Sure-Tan* decision precluded any award of backpay to aliens not authorized to work in this country, but then reversing itself in another split decision in *A.P.R.A. Fuel. Felbro and Local 512, Warehouse & Office Workers' Union*, 274 N.L.R.B. 1268 (1985); *Local 512*, 795 F.2d at 708; *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. 408 (1995). In the present case, the Administrative Law Judge held that *Sure-Tan* foreclosed any backpay award to the illegal alien known as Castro, only to have the NLRB reverse him in another split decision. Finally, the District of Columbia Circuit issued two split decisions here, both of which reach the wrong result.

Clearly, the proper interpretation of this Court's holding in *Sure-Tan* has engendered the type of conflict within the circuits that cries out for review and resolution by this Court. For this reason alone, this Petition should be granted.

2. The District of Columbia Court of Appeals Misinterpreted *Sure-Tan*

In the present case, it is undisputed that Castro entered the United States illegally and illegally obtained employment at Hoffman by using a fraudulent birth certificate. The outcome in the instant case is, therefore, controlled by this

Court's words in *Sure Tan*—backpay must be "tolled" during "any period when the undocumented worker [is] not lawfully entitled to be legally present and employed in the United States." Because Castro never was lawfully present nor lawfully entitled to employment during the backpay period, *Sure-Tan* requires that he be denied backpay.

The Court of Appeals agrees that, "[r]ead literally," *Sure-Tan* stands for the proposition that an undocumented alien who is not legally present or legally entitled to employment is not entitled to backpay. *Hoffman Plastic Compound, Inc. v. NLRB*, 237 F.3d 639, 642 (D.C. Cir. 2001). However, the majority maintains that it is not restricted by this proposition. Indeed, the majority contends that rather than barring backpay to undocumented aliens, "[p]roperly understood, *Sure-Tan* supports backpay awards to undocumented discriminatees...." *Id.* at 640.

To understand *Sure-Tan* in such a way, however, the majority is forced to weave a web of complicated theories, which twists *Sure-Tan's* language beyond comprehension. This complicated re-construction of *Sure-Tan* begins with the majority's erroneous conclusion that the crucial sentence—"the employees must be deemed unavailable for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States"—did not address any issue before the *Sure-Tan* Court. *Id.* at 642. The majority states that this language, "form[s] no part of *Sure-Tan's* holding or reasoning," *Id.* at 644, and is "hardly . . . dictum." *Id.* at 642.

The majority's conclusion boggles the mind. In a concise sentence, the *Sure-Tan* Court made it perfectly clear that backpay was indeed an issue before it. Even the majority acknowledges that this Court in *Sure-Tan* was faced with an issue regarding the "minimum backpay award." *Id.* at 643.

To further justify its departure from *Sure-Tan*, the majority contends that *Sure-Tan's* holding regarding the tolling of backpay was intended only to eliminate the

incentive for illegal aliens to illegally re-enter the United States. The majority reasons that, because the *Sure-Tan* discriminatees had left the country, that *Sure-Tan* stands for the proposition that only those undocumented workers who absent themselves from the country during the backpay period are ineligible for backpay. *Id.* at 642-43.

To be sure, the Supreme Court in *Sure-Tan* was concerned with deterring unauthorized immigration. To guard against illegal entry, the Supreme Court stated:

> "[A]s the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally important Congressional objective to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided." 467 U.S. at 902-03.

It is unsurprising that the Supreme Court focused on legal reentry as a prerequisite to reinstatement. Without legal reentry, the *Sure-Tan* employees who had left the country could not be lawfully reinstated.

However, the Court's discussion regarding backpay was not so narrowly constrained. The Court stated:

> "Similarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903.

Nowhere does the Supreme Court expressly state that the backpay portion of its decision applies only to those illegal

aliens who depart the country. Instead, the Court's holding sweeps more broadly and denies backpay not only to those illegal aliens who are not legally present in the United States, but also to those who, like Castro, are not legally entitled to be employed in the United States.

Even the majority has difficulty reconciling *Sure-Tan's* broad language with its narrow interpretation:

> "It is true, as Hoffman points out, that the words 'not lawfully entitled to be present and employed' sweep more broadly than necessary to deter undocumented discriminatees from reentering the country illegally." 237 F.3d. at 644.

Once again however, the majority elects to disregard *Sure-Tan's* plain language because, in the majority's opinion, to do otherwise would "conflict[] with 'other language'... making it clear that undocumented discriminatees are in fact entitled to backpay." *Id.* The "other language" from *Sure-Tan* that the majority seizes upon is as follows:

> "We generally approve the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902.

237 F.3d at 644.

This Court's general approval of the Board's traditional remedies is not at odds with the backpay limitation that it imposed in *Sure-Tan*. As Judge Sentelle points out in his dissent, this Court's general acceptance of these remedies "no more compels us to uphold a backpay award to an employee not lawfully entitled to employment than it compels us to uphold illegal reinstatement of the same employee." 237 F.3d. at 653.

Nor is the entitlement to a compliance proceeding somehow inconsistent with *Sure-Tan's* backpay prohibition.

The Supreme Court in *Sure-Tan* remanded the case to the NLRB to determine "whether any of the discharged employees will be able...to establish at the compliance proceedings that they were lawfully available for employment during the backpay period." 467 U.S. at 904, 906. In so doing, the Court recognized that the discharged employees would likely not be able to establish any entitlement to backpay at the compliance hearing. Indeed, the Court stated,

> "[T]he probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify judicial arrogation of remedial authority not fairly encompassed within the Act."

Id. at 904. Thus, a compliance proceeding is no guarantee to backpay, but simply a procedural step that must occur before backpay, if any, is awarded.

As demonstrated above, the majority goes astray at every step in its analysis of *Sure-Tan* and its application of *Sure-Tan* to the instant case. The majority's misinterpretation and misapplication of *Sure-Tan* requires review by this Court.

B. Supreme Court Review Is Required To Resolve A Conflict Among The Circuits With Regard To The Application Of The Immigration Laws

1. IRCA and the INA

Congress enacted the Immigration Reform and Control Act ("IRCA") in 1986. IRCA makes it unlawful for any employer to knowingly hire or continue to employ an unauthorized alien. 8 U.S.C. § 1324a(a)(1)-(2). IRCA also makes it unlawful for any person to obtain employment by presenting documentation which falsely represents his immigration status. 8 U.S.C. § 1324c(a). Prior to IRCA, the Immigration and Nationality Act ("INA") made it a crime to use an identification document "knowing that the document was not issued lawfully for the use of the possessor, [or] ... that the document is false." 18 U.S.C. § 1546(b).

Castro's use of a fraudulent birth certificate to obtain employment at Hoffman was illegal under both the INA and IRCA. Because Castro's illegal act implicated this country's immigration laws, the NLRB was required to tailor its remedy to avoid any conflict between the NLRA, and the INA and IRCA. *Sure-Tan*, 467 U.S. at 903 ("In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective' – to wit, the objective of deterring unauthorized immigration that is embodied in the INA."). By awarding backpay to Castro, an illegal alien who obtained work illegally in the United States, the NLRB failed to properly account for the objectives of the immigration laws. And, the majority failed to correct this error when it affirmed the NLRB's backpay award.

2. The Court of Appeals Erred By Improperly Deferring to the NLRB

The majority justifies its failure to correct the Board's error by deferring to the judgment of the NLRB. In considering the potential policy conflicts between the NLRA and the immigration laws, the majority dodges the issue, stating, "we need not resolve these policy questions, for it is the Board that possesses expertise in this area and it is to the Board that we owe deference." 237 F.3d at 647. The Board was not entitled to such deference, however. Because the Board has no authority to interpret or apply the immigration laws, its decisions regarding such issues are entitled to no deference whatsoever. *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1393 n.3 (9th Cir. 1986), *cert. denied*, 484 U.S. 985, 108 S. Ct. 500 (1987).

3. The Court of Appeals Failed to Resolve the Conflict Between the NLRA and the Immigration Laws Created by the NLRB's Backpay Award

Rather than defer to the Board, the Court of Appeals was required to prevent the Board from issuing a remedy that

"potential[ly] conflict[s]" with the immigration laws. 467 U.S. at 903. This, the majority failed to do.

The majority suggests that there is no conflict between the NLRA and the immigration laws because nothing in IRCA prohibits an award of backpay to an undocumented worker. What the majority fails to appreciate, however, is that IRCA and the INA made Castro's employment illegal and, therefore, he was not legally available for employment in the United States and was not entitled to the backpay that he was granted by the NLRB. By approving a backpay award to Castro, the Court of Appeals elevated the labor laws above the immigration laws.

The majority defends its action by pointing to IRCA's legislative history, which the majority contends offers support for the Board's backpay award. This legislative history, a House Judiciary Committee report, states that IRCA's employer sanctions provisions are not intended to:

> "be used to undermine or diminish in any way labor protections in existing law, or limit the powers of federal or state labor relations board, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanction provisions are not intended to limit in any way the scope of the term 'employee' in Section 2(3) of the [NLRA], as amended or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan*, application of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." H.R. Rep. 99-682 (I), 99th Cong. 2d Sess. 58, *reprinted in* 6 U.S.S.C.A.N. 5649, 5662 (1986).

As this Court held in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98, 111 S. Ct. 1138 (1991) (superceded on other grounds by statute), where the language of a statute is clear, "we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *See also, Circuit City Stores, Inc. v. Adams*, 2001 U.S. LEXIS 2459, *26 (March 21, 2001) ("Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress."). Nothing about IRCA's application to this case is ambiguous and, therefore, there is no need to consult IRCA's legislative history.

Additionally, even if the legislative statement referenced by the majority were relevant, this statement falls far short of delivering any sort of backpay guarantee. As the Seventh Circuit found in *Del Rey Tortilleria v. NLRB*:

> "th[is] Committee Report merely endorses the first holding of *Sure-Tan* that undocumented aliens are employees within the meaning of the NLRA. The Committee did not disapprove of the part of the decision holding that undocumented aliens are entitled to receive backpay only for those periods when they are lawfully entitled to be present and employed in the United States. The Committee's preference that existing law be preserved can be read as support for the remedial holding of *Sure-Tan*. We do not believe that Congress, in passing IRCA, expressed its dissatisfaction with *Sure-Tan*'s remedial holding." 976 F.2d at 1121.

Under IRCA, it is beyond dispute that the employment of an undocumented alien is illegal. It also is beyond dispute that an undocumented worker who furnishes a fraudulent immigration document to obtain employment has committed a criminal act. Such undocumented workers are not "lawfully available for employment" and, thus, not eligible for an award of backpay. By holding otherwise, the majority created a

direct conflict between the immigration laws and the NLRA. This Court should accept review to resolve this conflict.

CONCLUSION

In *Sure-Tan*, this Court stated that backpay must be "tolled" during "any period when the undocumented worker [is] not lawfully entitled to be legally present and employed in the United States." At no time during the backpay period elucidated by the NLRB in this case was Jose Castro ever legally present in the United States or legally entitled to work in this country. Accordingly, under *Sure-Tan*, Castro was entitled to no backpay.

The Court of Appeals for the District of Columbia erred in approving the Board's backpay order for Castro. The Court of Appeals' approval of the backpay award disregards this Court's holding in *Sure-Tan* and conflicts with this country's immigration laws.

For all of the reasons stated herein, Hoffman respectfully requests that this Court grant its petition for *certiorari*.

Respectfully submitted,

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April 16, 2001

HOFFMAN PLASTIC COMPOUNDS; INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

United States Court of Appeals,
District of Columbia Circuit.

Argued *En Banc* Sept. 27, 2000.
Decided Jan. 16, 2001.

Employer petitioned for review of, and National Labor Relations Board (NLRB) cross-applied for enforcement of, NLRB order awarding undocumented alien backpay from date of his illegal termination until employer discovered he was unauthorized to work. A panel of the Court of Appeals, 208 F.3d 229, ordered enforcement. Following grant of petition for rehearing en banc, the Court of Appeals, Tatel, Circuit Judge, held that: (1) alien's undocumented status did not render him ineligible to obtain backpay as remedy for employer's violation of National Labor Relations Act (NLRA), and (2) NLRB did not abuse its discretion in denying undocumented alien reinstatement and limiting his backpay to period beginning with his unlawful termination and ending on date employer learned of his undocumented status.

Enforcement granted

Sentelle, Circuit Judge, dissented and filed opinion with which Henderson and Randolph, JJ, joined and Ginsburg, Circuit Judge, joined in part.

Ginsburg, Circuit Judge, dissented and filed opinion.

1. Courts 96(3)

Pronouncements of United States Supreme Court must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court's apparent intentions and with other language in the same opinion.

2. Labor Relations 632

United States Supreme Court's *Sure-Tan* decision, tolling backpay due worker under National Labor Relations Act (NLRA) for any period during which worker was not lawfully entitled to be present and employed in United States, applied only to workers who had left country and were seeking to reenter, rather than undocumented employees who had never left country. National Labor Relations Act, § 8(a)(1, 3), as amended, 29 U.S.CA § 158(a)(1, 3).

3. Labor Relations 632

National Labor Relations Board (NLRB) order, requiring employer found to have violated National Labor Relations Act (NLRA) to provide backpay to undocumented alien employee up to date that employer discovered that employee was undocumented, did not cause employer to violate Immigration Reform and Control Act (IRCA) provision penalizing use of undocumented aliens. Immigration and Nationality Act, § 274(a), 8 U.S.C.A § 1324(a); National. Labor Relations Act, § 8(a)(1, 3), as , amended, 29 U.S.CA. § 158(a)(1, 3).

4. Statutes 219(1)

Government agency's interpretation of statute which it does not administer is entitled to no deference by court.

5. Labor Relations 611

When National Labor Relations Board (NLRB) is required to consider another statutory scheme, in fashioning enforcement order under National Labor Relations Act (NLRA), NLRB must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner

that minimizes the impact of its actions on the policies of the other statute. National Labor Relations Act, § 8(a)(1,3), as amended, 29 U.S.C.A. § 158(a)(1, 3).

6. Labor Relations 669

Employer lacked standing to assert that National Labor Relations Board (NLRB) violated equal protection rights of documented alien workers by granting backpay to undocumented workers subjected to unfair labor practices in violation of National Labor Relations Act (NLRA), without considering ability of undocumented workers to mitigate damages. U.S.C.A. Const. Amend. 5; National Labor Relations Act, § 8(a)(1, 3).

On Petition for Review and Gross-Application for Enforcement of an Order of the national Labor Relations Board.

Maurice Baskin argued the cause for petitioner. With him on the briefs was Ryan D. McCortney.

Sharon Block, Attorney, national Labor Relations Board, argued the cause for respondent. With her on the brief were Leonard R. Page, General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Fred L. Cornnell, Jr., Attorney. Linda R. Sher, Associate General Counsel, and John D. Burgoyne, Deputy Associate General Counsel, entered appearances.

James B. Coppess argued the cause for amicus curiae American Federation of Labor and Congress of Industrial Organizations. With him on the brief were Jonathan P. Hiatt and Laurence Gold.

Before: EDWARDS, Chief Judge, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH,

ROGERS, TATEL, GARLAND, Circuit Judges, and SILBERMAN, Senior Circuit Judge.*

Opinion for the Court filed by Circuit Judge TATEL.

Dissenting opinion filed by Circuit Judge SENTELLE, in which Circuit Judges GINSBURG, HENDERSON, AND RANDOLPH join.

Dissenting opinion filed by Circuit Judge GINSBERG.

TATEL, Circuit Judge:

Petitioner illegally fired several workers in retaliation for their attempts to organize a union. Finding multiple unfair labor practices, the National Labor Relations Boars ordered its traditional remedy, reinstatement wit backpay, for all discharged employees. When the Board learned that one discriminatee was an undocumented alien, it denied reinstatement and terminated backpay as of the date petitioner discovered the discriminatee's lack of documentation. Challenging even this reduced award, petitioner argues that both *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), and the Immigration Reform and Control Act of 1986 ("IRCA"), 100 Stat. 3359, bar awards of any backpay to undocumented discriminatees. We disagree. Properly understood, *Sure-Tan* supports backpay awards to undocumented so long as the awards reflect the discriminatees' actual losses. Moreover, because nothing in IRCA prohibits such limited backpay awards, and because the Board fashioned the award in this case not just to fulfill the objective of the National Labor Relations Act, but also to avoid violations of IRCA, the award falls within the Board's broad remedial discretion. We therefore deny the petition for review and grant the cross-application for enforcement.

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* Senior Judge Gilberman was in regular active service at the time of oral argument. Judge Garland took no part in this matter.

I

Petitioner Hoffman Plastic Compounds, Inc., manufactures custom-formulated polyvinylchloride pellets for use by customers who produce pharmaceutical, construction, and household products. In May 1998, José Castro, began working in Hoffman's production plant earning minimum wage as a compounder, an operator of large blending machines that mix and cook plastic formulas ordered by customers. When the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO began an organizing drive at Hoffman's factory, Castro, along with several other employees, distributed union authorization cards to coworkers. Following what the Board later described as "coercive and restraining" interrogation of union supporters, Hoffman laid off all employees who had engaged in organizing activities, including Castro. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 1992 WL 14561 (1992).

After one discharged employee filed charges with the Board, an Administrative Law Judge found that the company had engaged in multiple unfair labor practices. The Board adopted the ALJ's findings, concluding not only that Hoffman had unlawfully interrogated employees about their union activities and sympathies, but also that "in order to rid itself of known union supporters, [the company] discriminatorily selected union adherents for lay-off" in violation of sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1), (3). *Hoffman Plastic*, 306 N.L.R.B. at 100. The Board ordered Hoffman to cease and desist from such unfair labor practices, to post a notice at the work site and to reinstate and make whole the union supporters it had illegally fired.

When a dispute arose as to the proper computation of backpay, a compliance hearing was held before another ALJ. Castro appeared at the hearing, testifying through an interpreter. When Hoffman's attorney began questioning Castro about his citizenship, the Board's General Counsel objected. The ALJ sustained the objection. The ALJ

sustained the objection, but not before Castro had stated that he was a Mexican national and that the birth certificate he had used to gain employment at Hoffman was borrowed from a friend. On the basis of this admission, the ALJ recommended neither reinstatement nor backpay. In reaching this conclusion, the ALJ relied on IRCA, which makes it unlawful for employers to knowingly hire undocumented workers and for employees to use fraudulent documents to establish employment eligibility. *See Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 663, 685, 1994 WL 397901 (1994).

Expressly considering the policies of both IRCA and the NLRA, the Board agreed with the ALJ that reinstatement of an undocumented discriminatee would be inappropriate. *See* 326 N.L.R.B. No. 86, 1998 WL 663933, at *2-4 (Sept. 23, 1998). As the Board had explained in an earlier case, ordering reinstatement would force an employer to violate IRCA's prohibition against knowingly hiring undocumented aliens. *See A.P.R.A Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 415, 1995 WL 803434 (1995). The Board disagreed with the ALJ that IRCA prevented any award of backpay. To account for IRCA's prohibition on the fraudulent use of documents, however, the Board applied its well-established after-acquired evidence rule and ended backpay liability the moment Hoffman became aware of Castro's undocumented status. *Hoffman Plastic*, 1998 WL 663933 at *3-4.

Hoffman petitioned for review of the Board's order. The company did not challenge the Boards's finding that it committed unfair labor practices, including the illegal discharge of known union organizers. It contested only Castro's limited backpay award, arguing primarily that awards of backpay to undocumented discriminatees are barred by *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), and, in the alternative, by IRCA. Cross-applying for enforcement, the NLRB, supported by amicus AFL-CIO, responded that the limited backpay award runs

afoul of neither *Sure-Tan* nor IRCA and falls well within the Board's remedial discretion.

A divided panel of this court resolved all issues in the Board's favor. *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir.2000). We then granted Hoffman's petition for rehearing en banc and vacated the panel opinion: Having now heard Hoffman's claims en banc, we again deny the petition for review and grant the Board's cross-application for enforcement.

II

[1, 2] We begin with Hoffman's argument, embraced by our dissenting colleagues, that this case is controlled by a single sentence from *Sure-Tan*: "[I]n computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore toiled) during any period when they were not lawfully entitled to be present and employed in the United States." *Sure-Tan*, 467 U.S. at 903, 104 S.Ct. 2803. This sentence, Hoffman claims, "plainly prohibits: the NLRB from awarding even limited backpay to undocumented workers victimized by unfair labor practices. Read literally and divorced from *Sure-Tan*'s factual and legal context, the sentence could well be interpreted to support that view. But the Supreme Court has warned against "dissect[ing] the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). And as we have said, "[t]he Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent wit the Court's apparent intentions and with other language in the same opinion." *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284, 1291 (D.C.Cir.1998) *(en banc)*.

Read in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees. The Seventh Circuit originally crafted the sentence, which the Supreme Court merely repeated, to deal with unique circumstances of

Sure-Tan not present in this case. Contested by neither party, the restriction imposed by the sentence did not address an issue in dispute before the Court; nor did it play any part in either *Sure-Tan*'s holding or reasoning. As such, the sentence is hardly "considered dict[tum]." *Cf.* Dissenting Op. At 654. Moreover, extending the sentence beyond the facts of *Sure-Tan*, as Hoffman urges, would conflict with the Court's holding that an undocumented discriminatee is entitled to backpay so long as it is appropriately tailored to the discriminatee's actual loss.

The employer is *Sure-Tan* committed an unfair labor practice when, in retaliation for its employees' success in electing a union it alerted the Immigration and Naturalization Service that some of its employees might be undocumented. Rather than deport the workers, the INS allowed them to leave the country voluntarily. "By the end of the day, all five employees were on a bus ultimately bound for Mexico." *Sure-Tan*, 467 U.S. at 887, 104 S.Ct. 2803. The Board ordered the traditional remedy of reinstatement with backpay. *Sure-Tan*, 246 N.L.R.B. 788, 1979 WL 9533 (1979). Two members dissented, fearing that these remedies could produce violations of the then-existing immigration law, the Immigration and Nationality Act. *Id.* At 789-90. The INA focused not on employment of undocumented workers—that came later when Congress enacted IRCA—but rather on "the terms and conditions of admission to the country." *Sure-Tan*, 467 U.S. at 892, 104 S.Ct. 2803 (quoting *De Canas v. Bica*, 424 U.S. 351, 359, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976)). Citing these prohibitions, the dissenters would have limited the remedy to avoid "encourag[ing] a discriminatee to reenter the country illegally." *Sure-Tan*, 246 N.L.R.B. at 789.

Echoing the dissenting members' concerns, the Seventh Circuit "modif[ied the Board's] remedy in some aspects." *See NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 603-06 (7th Cir. 1982). The court allowed Sure-Tan to remind the discriminatees in the reinstatement offer that without obtaining proper documentation they could not reenter the United States to

reclaim their jobs. *Id.* at 605-606. To reduce the appeal of illegal reentry, the court also modified the order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement." *Id.* at 606

Eliminating still another incentive for illegal reentry, the court added a clarification to the Board's backpay order, a clarification that forms the basis for the sentence at issue in this case: "[I]n computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Id.* This limitation, which was based on the Board's standard practice of tolling backpay when discriminatees are physically unavailable, *see Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 716 n.9 (9th Cir.1986) ("*Felbro*") (citing 3 NLRB Casehandling manual §§ 10,612, 10,656.9), including when out of the country, *see Hickory's Best, Inc.*, 267 N.L.R.B. 1274, 1277, 1983 WL 24897 (1983), ensured that illegal reentry would not restart the accumulation of backpay.

Though the Seventh Circuit believed that these restrictions were needed to prevent violations of the INA, it worried that in the circumstances of this case"—the *Sure-Tan* discriminatees had been out of the country since the company's violation—the restrictions might result in no backpay at all. *See Sure-Tan*, 672 F.2d at 606. To solve this problem and to "effectuate the policies of the [NLRA]," the court ordered the employer to pay the discriminatees backpay for an "obviously conjectural" six-month period. *Id.*

The Supreme Court began by emphasizing that neither party challenged the "not lawfully entitled" restriction on which Hoffman now relies. Sure-Tan had supported the restriction throughout, *Sure-Tan*, 467 U.S. at 898 n. 8, 104 S.Ct. 2803, and even the Board had come to accept it:

> Conditioning the offers of reinstatement on the employees' legal reentry and deeming the employees

> "unavailable" during any period when they were not lawfully present are requirements that were in fact imposed by the Court of Appeals in this case, and hence fully accepted by the Board.... The Board has clearly indicated its agreement with these portions of the Court of Appeals' remedial order by specifically noting that petitioners do not challenge these parts of the order [and] by limiting its own argument to the *minimum backpay award* issue alone.

Id. at 903 n. 12, 104 S.Ct. 2803 (emphasis added); *see also Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1123 (7th Cir. 1992) (Cudahy, J., dissenting). Turning its attention to that limited issue—the "minimum backpay award"—the Supreme Court held that the Seventh Circuit had not only "exceeded its narrow scope of review" by substituting its own judgment for that of the Board, but also erred by not sufficiently tailoring its remedy "to the actual, compensable injuries suffered by the discharged employees." *Sure-Tan*, 467 U.S. at 900, 901, 104 S.Ct. 2803. Although agreeing with the Seventh Circuit that these restrictions would mean that the Sure-Tan discriminatees would likely receive no backpay, *id.* at 903-04, 104 S.Ct. 2803, the Court cautioned that "the probable unavailability of the [NLRA's] more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act." *Id.* at 904, 104 S.Ct. 2803. In reaching this conclusion, the Court mentioned the "not lawfully entitled" restriction on backpay simply to explain the Seventh Circuit's motive for imposing a six-month minimum award. The additional sentence relied on by our dissenting colleagues, *see* Dissenting Op. at 651, adds no new restriction; it merely summarizes the Court's holding that backpay awards must be tailored to the discriminatees' individual circumstances as determined by the Board.

Not only does the sentence on which Hoffman relies thus form no part of *Sure-Tan*'s holding or reasoning, but contrary

to the company's claim, it presents no bar to awarding backpay to undocumented discriminatees. As we explained above, the Seventh Circuit crafted the restriction to ensure that the *Sure-Tan* discriminatees who had left the country would not reenter illegally to claim backpay. *See supra* at 653-54. In so interpreting the restriction, we rely not on the Seventh Circuit's intended meaning, *cf.* Dissenting Op. at 652-53, but rather on the Supreme Court's expression of precisely the same concern:

> [A]s the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' *legal readmittance to the United States*. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally important Congressional objectiv[e]—to wit, the objective of *deterring unauthorized immigration* that is embodied in the INA. By conditioning the offers of reinstatement on the employees' *legal reentry*, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

Id. at 902-03, 104 S.Ct. 2803 (internal quotation marks and citation omitted) (emphasis added).

It is true, as Hoffman points out, that the "not lawfully entitled to be present and employed" sweep more broadly than necessary to deter undocumented discriminatees from reentering the country illegally. But reading these words to impose an absolute bar to any award of backpay for undocumented discriminatees not only ignores the fact that the Seventh Circuit crafted the restriction to deal with the precise problem it faced—but also conflicts with "other language" (our words in *Aka*, 156 F.3d at 1291) making it clear that undocumented discriminatees are in fact entitled to backpay. Specifically, the Court "generally approve[d of] the

Board's original course of action in this case by which it ordered the conventional remedy of reinstatement and backpay, leaving calculation of the precise amount of backpay until the compliance proceeding. *Sure-Tan*, 467 U.S. at 902, 104 S.Ct. 2803. The "main deficiency' in the Seventh Circuit's order, the Court explained, was not that it awarded backpay to undocumented discriminatees, but that the *amount* of backpay awarded was "develop[ed] in the total absence of any record evidence as to the circumstances of individual employees," thus violating the "cardinal" proposition "that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Id.* at 899-900 n. 9, 900, 104 S.Ct. 2803. The Court continued:

> [T]he Court of Appeals "estimated" an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence. In the absence of relevant factual information or adequate analysis, it is inappropriate for us to conclude ... that the Court of Appeals had estimated the proper minimum backpay award "with a fair degree of precision."

Id. at 901-02 n. 11, 104 S.Ct. 2803. If, as Hoffman argues, undocumented discrimantees may never be awarded backpay, the Court would not have mentioned "the proper minimum backpay award" or "the period of time these particular employees might have continued working." Nor would there have been a need for more relevant factual information or adequate analysis," much less for a compliance proceeding to determine the amount of backpay actually due. According to the dissent, the compliance proceeding was intended only to determine whether the discriminatees had legally returned to the country. *See* Dissenting Op. at 653-54. The Supreme Court itself made clear, however, that such a hearing would determine "the period of time these particular employees might have continued working before apprehension by the INS." *See Sure-Tan*, 467 U.S. at 902 n. 11, 104 S.Ct. 2803.

Hoffman next argues that IRCA's subsequent adoption of employer penalties for knowingly hiring undocumented aliens extended the Sure-Tan sentence to all undocumented discriminatees, including those who, like Castro, never leave the country. According to Hoffman, Castro now falls squarely within the *Sure-Tan* sentence because he is no longer "legally entitled to be . . . employed." Had the sentence established a general rule of law, we might agree. As we demonstrate above, however, the sentence is neither general (it addressed only the unique factual situation in *Sure-Tan*), nor a rule (it played no part in either the Court's holding or reasoning). The Court, moreover, did not consistently describe the limitation in terms of employment eligibility. At one point, it referred to the sentence as conditioning backpay merely on "legal presence in this country"; elsewhere, it referred to being "lawfully present." *Id.* at 898 n. 8, 104 S.Ct. 2803; id, at 903 n. 12, 104 S.Ct. 2803.

Two of the three Circuits that have addressed this issue agree with our interpretation of *Sure-Tan*. In *A.P.R.A. Fuel*, the Second Circuit held that *Sure-Tan* bars awards on backpay only to undocumented discriminatees who were unavailable for work because they were outside the country and unable to lawfully reenter. *See A.P.R.A. Fuel*, 134 F.3d 50, 54-55 (2d Cir. 1997). Likewise, in *Felbro*, the Ninth Circuit stated:

> In *Sure-Tan*, the Supreme Court did not address the issue whether undocumented workers remaining at work in the United States throughout the backpay period are entitled to backpay awards. *Sure-Tan* barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers.

Felbro, 795 F.2d at 722. To be sure, in a later case also upholding an award of backpay to undocumented workers, the Ninth Circuit added a footnote speculating whether the

enactment of IRCA might "change [] the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover backpay." *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n. 11 (9thCir.1989); *see also Rios v. Enterprise Ass'n Steamfitters*, 860 F.2d 1168, 1172 n. 2 (2d Cir.1988) (noting, in a footnote, the passage of IRCA, but "not decid[ing] the effect of this provision on future claims"). Yet the Ninth Circuit and its district courts have consistently reaffirmed that undocumented workers remain protected by labor and employment laws after IRCA and have continued to award them backpay. *See, e.g., NLRB v. Kolkka*, 170 F.3d 937 (9th Cir.1999); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D.Cal.1998); *Escobar v. Baker*, 814 F.Supp. 1491, 1498 (W.D.Wash.1993); *EEOC v. Tortilleria "La Mejor,"* 758 F.Supp. 585 (E.D.Cal. 1991). Only the Seventh Circuit has interpreted *Sure-Tan* differently, though a strong dissent pointed out that the panel and the Supreme Court

> faced a significantly different scenario. In *Sure-Tan*, the aliens in question were not only undocumented, they were not in the country. They could not reenter for the purpose of taking up employment without breaking the law. This was the Court's concern in *Sure-Tan* (and the panel's concern before it).

Del Rey Tortilleria, 976 F.2d at 1123-24 (Cudahy, J., dissenting).

III

[3] Hoffman argues that even if *Sure-Tan* does not bar backpay to undocumented discriminatees, IRCA does. Yet nothing in IRCA direcely bars such an award. As Hoffman itself acknowledges, IRCA neither amends nor repeals the NLRA or any other labor law. IRCA's legislative history, moreover, shows that Congress did not intend the statute to limit the NLRA even indirectly. The House Judiciary

Committee Report stated that no provision of IRCA should

> be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the [NLRA], as amended, or of the rights and protections stated in Sections 7 and 8 of that Act.

H.R. Rep. 99-682, pt. 1, at 58 (1986), U.S. Code Cong. & Admin. News at 5649, 5662. The Judiciary Committee relied on *Sure-Tan* to support its view that continued protection of undocumented workers under the NLRA is fully consistent with IRCA's goals:

> As the Supreme Court observed in *Sure-Tan*, application of the NLRA [to undocumented workers] "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."

Id. (internal citation omitted). Echoing this view, the House Education and Labor Committee Report stated that no provision of the law should

> limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, *the National Labor Relations Board*, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights

> before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R.Rep. No. 99-682, pt. 2, at 8-9 (1986), U.S. Code Cong. & Admin. News at 5757, 5758 (emphasis added).

[4,5] Absent a statutory bar to backpay for undocumented discriminatees, we turn to the alternative argument we understand Hoffman to be making: that the Boards' backpay award fails to accommodate IRCA's goal of limiting the hiring of undocumented workers. Two principles guide our consideration of this issue. First, while the Board's formulation of remedies for NLRA violations merits the highest level of deference, *see ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994), its interpretation of IRCA warrants no deference at all. *See, e.g., New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338, 1365 (D.C.Cir.1988) (agency interpretation of a statute it does not administer is entitled to no deference). Second, in enforcing the NLRA, the Board may not

> ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern Steamship Co. v. NLRB, 316 U.S. 31, 47, 62 S.Ct. 886, 86 L.Ed. 1246 (1942). If a conflict requires the Board "to accommodate the policies of another statutory regime within the framework of the legislation it administers,it "must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact

of its actions on the policies of the other statute." *New York Shipping*, 854 F.2d at 1367.

> [A]n agency, faced with alternative methods of effectuating the policies of the statute it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime. *Id.* at 1370.

The Board's first opportunity to consider whether and to what extent traditional NLRA remedies might require modification to account for IRCA's employer sanctions came in *A.P.R.A. Fuel*. *See* 320 N.L.R.B. 408. Beginning with *New York Shipping's* requirement that it "fully enforce the requirements of its own statute," 854 F.2d at 1367, the Board, citing *Sure-Tan*, explained why NLRA policy calls for backpay for undocumented discriminatatees. 320 N.L.R.B. at 414. Because "undocumented aliens are extremely reluctant to complain to the employer or to any of the agencies charged with enforcing workplace standards," they make easy targets for an employer's "unprincipled effort to stave off . . . union representation." *Id.* at 414. Employers resisting unions could simply fire undocumented workers who try to organize and then raise "the unlawful immigration status of their discharged employees in retaliation for protected activities"; employers might even "consider the penalties of IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance." *Id.* at 415. The Board also found that denying backpay would harm the collective bargaining rights of authorized workers because "the continuous threat of replacement with powerless and desperate undocumented workers would certainly chill the American and authorized alien workers' exercise of their Section 7 rights." *Id.* at 414.

We recognize that there may be different views on the extent to which awarding backpay to undocumented discriminatees reduces employer incentives to violate the NLRA. It could be argued, for example, that employers would not likely risk criminal penalties for knowingly hiring undocumented workers simply to gain the increased leverage that would flow from reduced remedies for unfair labor practices. But even if this is true, employers who merely suspect their workers are undocumented will still have reason to test the boundaries of the NLRA. In the end, however, we need not resolve these policy questions, for it is the Board that possess expertise in this area and it is to the Board that we owe deference. *See New York Shipping*, 854 F.2d at 1364 (holding that courts must defer to an agency "interpretation of its own organic legislation" even where there are competing statutory schemes). Indeed, the very existence of competing views reinforces the need for reliance on the Board's experience.

We have the same reaction to Hoffman's argument that the Board lacked authority to award backpay here because "none of the 'parade of horribles'" the Board identified in *A.P.R.A. Fuel*—including employer exploitation of workers' undocumented status to chill union activity—"could have occurred in this case." In order to take advantage of undocumented workers, Hoffman claims, the employer must be aware of the undocumented status, and "[i]t is beyond dispute" the company did not "[know] that Castro was an undocumented alien" at the time of the unfair labor practice. *See* Supp. Br. for Pet'r at 14. According to the Board, however, denying undocumented workers remedies for retaliation would chill participation in union activities "regardless of whether the employer knew of the undocumented worker's immigration status." Supp. Br. for Resp. at 4. Hoffman provides no reason for believing that the Board's position on this issue represents an unreasonable interpretation of the NLRA.

Having explained its reasons for believing that NLRA policy requires remedies for undocumented discriminatees, the *A.P.R.A. Fuel* Board addressed its second *New York Shipping* obligation: the accommodation of immigration policy. It began by observing that the NLRA and IRCA share "virtually identical policy objectives with respect to the American workplace .... [W]e believe that we can best achieve this mutuality of purpose and effect by vigorously enforcing the NLRA, including providing traditional Board remedies, with respect to all employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals." *A.P.R.A. Fuel*, 320 N.L.R.B. at 411. As the Board noted, *Sure-Tan* itself recognized that preserving N.L.R.A. protection

> eliminates the distinct economic advantage and thus the incentive to employers of hiring illegal aliens in preference to American citizens or alien employees working lawfully. A reduction in the availability of jobs to undocumented aliens, the Court found, would in turn discourage many aliens from entering the United States illegally.

Id. at 412. Citing the legislative history of IRCA quoted above, the Board observed that a similar concern explained Congress' insistence that the Act not "be used to undermine or diminish in any way labor protections in existing law." *Id.* at 413 (quoting H.R. Rep. 99-682, pt. 1, at 58, U.S. Code Cong. & Admin. News at 5662); *see also A.P.R.A. Fuel*, 134 F.3d at 56.

The Board then applied these NLRA and IRCA policies to formulate a remedy for the specific unfair labor practices it had found. To accomplish the NLRA's purposes, the Board ordered reinstatement with backpay. But in order to avoid conflict with IRCA's prohibition on knowingly hiring undocumented aliens, it conditioned reinstatement on the discriminatees; production of proper documents. *A.P.R.A. Fuel*, 320 N.L.R.B. at 415. It also ordered a limited period of

backpay to give the discriminatees the opportunity to obtain this documentation.

In crafting a remedy for Castro, the Board relied on *A.P.R.A. Fuel*'s accommodation of NLRA and IRCA policies, adding an additional limit to the remedy to account for the fact that unlike A.P.R.A. Fuel, Hoffman had no knowledge of Castro's illegal status when it hired him. Applying its after-acquired evidence rule, the Board relieved Hoffman of its reinstatement obligation altogether and cut off backpay at the moment Castro's status was discovered. *Hoffman Plastic*, 314 N.L.R.B. at 685-86. Rather than "pay[ing] Castro for doing nothing," Dissenting Op. at 651, the NLRB backpay award compensates him for lost work "in aid of the Board's authority to restrain violations" that harm *all* workers, *see Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 220, 59 S.Ct. 206, 83 L.Ed. 126 (1938)—and even that award was limited in recognition of Castro's undocumented status. Because the Board had no need to adopt *A.P.R.A. Fuel*'s other remedy—the award of backpay while the discriminatees attempted to obtain documentation—the propriety of such an award is not before us.

Hoffman argues that the Board should have gone further and denied Castro backpay altogether. As it points out, IRCA criminalizes the false use of documents to obtain employment. Yet the Board has long held that employee misconduct does not completely immunize employers from their backpay obligations, even when the discriminatees would not have been hired but for their own wrongful conduct. Cf. Dissenting Op. at 651. In *John Cuneo*, for example, the discriminatee falsified his job application. 298 N.L.R.B. 856, 1990 WL 122500 (1990). Instead of denying backpay altogether, as the employer had urged, the Board limited backpay to the period between the illegal discharge and the moment the employer learned of the employee's falsification. In doing so, the Board applied the after-acquired evidence rule to "balance [its] responsibility to remedy the Respondent's unfair labor practice against the public interest

in not condoning [the employee's] falsification of his employment application." *Id.* at 856. The Supreme Court has itself used the after-acquired evidence rule as a means of "deter[ring]" labor law violations and "compensat[ing]" discriminatees, without disregarding the "prerogatives" of employers. *See McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352, 362, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995)

Even where, as here, the discriminatee violates the law, the Supreme Court has refused to require the Board to deny all backpay. In *ABF Freight System v. NLRB*, 510 U.S. 317, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994), the discriminatee perjured himself during the compliance proceeding—an act which, like Castro's fraudulent conduct, violated federal criminal law, *see* 18 U.S.C. § 1621, *cited in ABF Freight*, 510 U.S. at 328-29, 114 S.Ct. 835. Although declaring that "[f]alse testimony in a formal proceeding is intolerable," and that "perjury should be severely sanctioned," *id.* At 323, 114 S.Ct. 835, the Court rejected the company's argument that such behavior should preclude the employee from receiving backpay:

> [The company's] contention, though not inconsistent with our appraisal of [the employee's] misconduct, raises countervailing concerns. Most important is Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice.

Id. at 323-24, 114 S.Ct. 835. Writing separately to emphasize that the Board's failure to adopt an unclean hands policy "undermines and dishonors the courts," *id.* at 326, 114 S.Ct. 835, two concurring Justices nevertheless agreed that the Board acted within its remedial discretion. *Id.* at 326, 114 S.Ct. 835 (Kennedy, J., concurring), at 329, 114 S.Ct. 835 (Scalia, J., concurring in judgment).

Attempting to distinguish *ABF Freight*, the dissent says that unlike the perjury statute, IRCA forbade Castro "from obtaining a job." Dissenting Op. at 657 n.2. This misreads IRCA. The statute makes it unlawful for employers to knowingly hire undocumented aliens, 8 U.S.C. § 1324(a)(3). IRCA dies not explicitly make it unlawful for undocumented aliens to work. True, Castro could have been prosecuted for his fraud, but there was nothing illegal about his actual employment. So when the Board ordered limited backpay, it was not compensating Castro for the loss of wages IRCA prohibited him from earning. No matter how much Hoffman may deplore Castro's conduct, *ABF Freight* stands for the proposition that balancing Castro's misconduct against Hoffman's is the Board's responsibility, not ours. Had the Board ruled that Castro's Behavior disqualified him from any backpay, we would have deferred to that decision as well. "Most important," said *ABF Freight*, and most important here, "is Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice." 510 U.S. at 323-24, 114 S.Ct. 835.

Hoffman argues that the Board's accommodation of IRCA fails for another reason: the remedy gives undocumented discriminatees an incentive to remain in the country to continue accumulating backpay. It could also be argued that by making U.S. jobs more attractive, awarding backpay to undocumented discriminatees actually encourages illegal immigration. Even if this is so, of course, the Board's providing a purely compensatory remedy for unfair labor practices could not make illegal immigration more attractive than it would be if employers never committed unfair labor practices. Our job, however, is not to resolve, or as the dissent puts it, to "mediate" such issues, Dissenting Op. at 656-57. So long as the Board neither misinterprets IRCA, see *New York Shipping*, 854 F.2d at 1365, "ignore[s]" the statute's policies, nor places "excessive emphasis" on the NLRA, *Southern Steamship*, 316 U.S. at 47, 62 S.Ct. 886, we

will not upset its precise accommodation of the statutory schemes.

In sum, the NLRB has fully satisfied *its New York Shipping* obligation. The Board crafted the limited backpay remedy to avoid conflict with IRCA and to implement its understanding of the purposes of both IRCA and the NLRA. According to the Board, the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA's goal), reinforces collective bargaining rights for all workers (the NLRA's goal), and protects wages and working conditions for authorized workers (the goal of both Acts). Far from "ignor[ing] other and equally important Congressional objectives," *Southern Steamship*, 316 U.S. at 47, 62 S.Ct. 886, the Board, fully enforcing its own statute, carefully considered IRCA and modified its traditional backpay remedy accordingly. If, as Hoffman believes, undocumented discriminatees should receive no backpay at all, its remedy lies in Congress not this court.

IV

[6] Hoffman's final argument requires little discussion. The company claims that "[b]y awarding undocumented aliens backpay without any consideration regarding whether these individuals can mitigate their damages, the Board treats illegal aliens more favorably than documented workers and, by doing so, the Board violates the equal protection clause of the Fifth Amendment to the United States Constitution." Brief for Pet'r at 33. Not only does Hoffman lack standing to assert equal protection rights of third parties, *see, e.g., Powers v. Ohio*, 499 U.S. 400, 410-16, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), but it points to no evidence that the Board applies a different mitigation standard to undocumented discriminatees. In any event, the Board found that Castro both sought and obtained interim employment, thus fulfilling his duty to mitigate. The Board subtracted Castro's interim earnings of almost $4,000 from his backpay award.

Finally, we think it worth pointing out that Hoffman itself could have mitigated its backpay liability either by making Castro a bona fide reinstatement offer—although it did offer to rehire him, the Board found the offer inadequate—or by complying promptly with the Board's reinstatement order issued before Castro's undocumented status became known. *See Hoffman Plastic*, 1998 WL 663933, at *2, *5. INS regulations promulgated pursuant to IRCA expressly permit reinstatement after unlawful discharge without requiring the employer to reverify the employee's documents. 8 C.F.R. § 274a.2(b)(viii)(A)(5).

V

The petition for review is denied and the cross-application for enforcement is granted.

So ordered.

SENTELLE, Circuit Judge, dissenting, with whom HENDERSON and RANDOLPH, Circuit Judges, join, and GINSBURG, Circuit Judge, joins in part:

In May of 1988, an undocumented alien having illegally entered the United States compounded his illegality when he fraudulently used the name and birth certificate of Jose Castro to obtain employment in the production plant of Hoffman Plastic. On January 31, 1989, the company laid off a number of employees supportive of a union organizing effort, including the employee who had falsely and illegally represented himself to be Jose Castro. Thereafter, an administrative law judge, following an evidentiary hearing, found that Hoffman had engaged in unfair labor practices including the discriminatory selection of union adherents in the layoffs which included the illegal alien known as Castro.

After the disclosure of the undocumented worker's illegal status and his fraudulent use of the birth certificate, the administrative law judge recommended neither reinstatement nor backpay. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 1994 WL 397901 (1994). Upon review, the

Board agreed with the ALJ that reinstatement of an undocumented alien was beyond its authority, but ordered backpay from the time of the discriminatory discharge until the revelation of Castro's undocumented status. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 86, 1998 WL 663933 at *2-4. I would reverse the Board and restore the ALJ's recommended result.

As it would be unlawful for Hoffman to employ the illegal and pay him earned wages, it defies the logic of the Immigration Reform and Control Act of 1986 ("IRCA") that the employer could be compelled by law to pay to the illegal unearned wages which he could not lawfully earn and to which he would have no claim but for his prior successful fraud. If this were a case of first impression I would find it simple. I would hold that by no theory of law or equity could the federal government compel an employer to employ an illegal alien to do nothing and pay him for doing nothing when it could not lawfully employ him to work and pay him for working. But this is not a case of first impression. The Supreme Court has offered clear guidance which makes the case an even easier one.

Analysis

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), the Supreme Court reviewed a Seventh Circuit decision which had modified an NLRB order applying the National Labor Relations Act ("NLRA") to unfair labor practices committed against undocumented aliens, *see NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982). The High Court concluded that the Circuit was correct in upholding the Board's position "that undocumented aliens are 'employees' within the meaning of [29 U.S.C. § 152(3)]." *Sure-Tan*, 467 U.S. at 891, 104 S.Ct. 2803 (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130, 64 S.Ct. 851, 88 L.Ed. 1170 (1944)); *cf. Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

That said, the Supreme Court nonetheless vacated the remedial portion of the Seventh Circuit decision, which had ordered the Board to award an irreducible minimum of six months backpay to each of the affected employees in the face of the employees' illegal entry and presence in the United States. In vacating that portion of the Seventh Circuit decision, the Supreme Court held, "[b]y directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses *or legal availability for work*, the Court of Appeals plainly exceeded its limited authority under the Act." *Sure-Tan*, 467 U.S. at 904-05, 104 S.Ct. 2803 (emphasis added). Based on that italicized phrase, even if this were all the Supreme Court had held on the question, I would conclude that Sure-Tan counsels us to vacate the Board's decision overruling the logical result reached by the administrative law judge. But, the Supreme Court did not stop there.

The Supreme Court explicitly rejected the position taken by the NLRB and the majority in today's decision when it held, "[s]imilarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903, 104 S.Ct. 2803. Thus, the Supreme Court very clearly directed the appropriate response to the issue before the Board in the present case and did so directly opposite the disposition reached by the Board.

Read in context, the sentence speaks even more plainly:

> Nonetheless, as the court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally important Congressional objective—to wit, the objective of deterring unauthorized immigration that is embodied in the INA [Immigration and Nationality Act]. By

> conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. *Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.*

Id. at 902-03, 104 S.Ct. 2803 (emphasis added) (internal quotation marks and citation omitted). The Supreme Court in a rather concise paragraph makes it plain that it is dealing with the possibility of affording a backpay remedy to illegal aliens. It further makes it plain that such a remedy is not an option when the employees are "deemed unavailable" for work and that such a period of deemed unavailability occurs "during any period when they were not lawfully entitled to be present and employed in the United States."

Thus, the Supreme Court has definitively answered the question before us. Castro was not lawfully entitled to be present and employed in the United States. "[E]mployees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled)" when they are so situated. Therefore, the award of backpay to Castro for that period must be vacated. The majority advances a complex of theories for avoiding what seems to be the plain import of the Supreme Court's language in *Sure-Tan*. It starts by asserting that "the Seventh Circuit crafted the restriction to deal with the precise problem it faced,: that is, "undocumented discriminatees ... returning to the country illegally to claim their backpay." Maj. Op. At 644. This analysis fails for two reasons. First, we are not controlled by the origin of the instructive sentence in the Seventh Circuit. The Supreme Court's context is the governing context without regard to the original coinage of the sentence.. *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 572-73, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1995) (explaining that a district judge's findings of fact and conclusions of that court despite the fact they are drawn from the submissions of the parties). More

importantly, the Supreme Court's statement and its context give no indication that it meant other than what it said: not simply that there is some sort of unique bar applicable to illegal immigrants who have left the country and might unlawfully return, but that the same bar extends to all not lawfully entitled to be present and employed in the United States.

Expanding on its first attempt at distinction, the majority opines that when the Supreme Court "generally approve[d] [of] the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement and backpay" it somehow had created other language inconsistent with the broad effect of the Court's language in the disputed sentence. Maj. Op at 644. The majority then relies on the principle drawn from our decision in *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1291 (D.C.Cir.1998) (en banc), that the Supreme "Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court's apparent intent and with *other language* in the same opinion." (Emphasis supplied.) I have no quarrel with the principle, I simply do not agree that its application in this case compels the result reached by the majority. Indeed, I think it cuts to the contrary. The Language from the *Sure-Tan* decision cited by the majority blesses in general terms the remedies of reinstatement and backpay. It no more compels us to uphold a backpay award to an employee than it compels us to uphold illegal reinstatement of the same employee.

I suggest that the most important "other words" of the Supreme Court are those immediately preceding the sentence of contention. Those I have quoted above. That is, that "[i]n devising remedies for unfair labor practices, the Board is obliged to take into account ... 'the objective of deterring unauthorized immigration that is embodied in the INA." As the Supreme Court makes plain, there is no inherent conflict between the labor statute and the INA. The conflict arises

only if the Board imposes remedies inconsistent with the immigration law. That is, the conflict arises not between two statutes, but between the remedial preferences of an administrative board and the higher authority of statutory enactment. In fact, in the following paragraph, the Supreme Court took care to note the "probable unavailability" of backpay "in light of the practical workings of the immigration laws." *Sure-Tan*, 467 U.S. at 904, 104 S.Ct. 2803. Following this "other language" of the Supreme Court, we should reach no other conclusion than the reversal of what the Board has done in the present case.

The majority further attempts to define the qualifying language away from its apparent meaning by extracting from a footnote the Supreme Court's observation that "the order's main deficiency" was that it "was 'develop[ed] in the total absence of any record evidence as to the circumstances of the individual employees.'" Maj. Op. At 644 (quoting *Sure-Tan*, 467 U.S. at 900 n. 9, 104 S.Ct. 2803). Far from supporting the majority's proposition, that language of the Supreme Court in context actually supports the application of the eligibility language by its terms. In footnote9, the Supreme Court is discussing the assertion of a dissenter that its review should be conducted deferentially, as if the Board rather than the Court of Appeals had developed the remedial order. Footnote 9 rejects that proposition as not going to the defect in the order. The language concerning the "total absence of any record evidence" is wholly consistent with the proposition that if the circumstances of an employee are that he was not lawfully eligible to be present and employed in the United States, then he does not receive a backpay recovery. Indeed, it is difficult to see what else the Supreme could have been referring to.

Today's majority opinion reads *Sure-Tan* as holding that the fired employees were entitled to backpay because it ordered a compliance proceeding "to determine the amount of backpay actually due." Maj. Op. At 645. This assertion misconstrues the posture of the case and the Court's holding.

Prior to the Court's decision in *Sure-Tan*, nobody had offered any evidence concerning what happened to the employees after they were deported. There was no question that the employees left the United States, but there was no way to know whether they had legally returned during the appropriate backpay period. As the original NLRB opinion explained, "[T]here is no evidence in the record that they have not returned to the United States. The appropriate forum for determining issues relating to their availability for work is a compliance proceeding." *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1187 (1978), *reh'rg denied, NLRB v. Sure-Tan, Inc.*, 677 F.2d 584 (7th Cir.1982), *aff'd in part, rev'd in part*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). Accordingly, the Supreme Court ordered that the case be remanded for the NLRB to determine "whether any of the discharged employees will be able ... to establish at the compliance proceedings that they were lawfully available for employment during the backpay period." *Sure-Tan*, 467 U.S. at 904, 104 S.Ct. 2803. As the Court explained, "these compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, if any, to which the discharged employees are individually entitled." *Id.* At 901, 104 S.Ct. 2903 (emphasis added).

The majority's interpretation is inconsistent with the Sure-Tan Court's instruction and holding. The Court acknowledged that the employees could be eligible for a backpay remedy, but it stressed that when computing their actual backpay awards, "the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be eligible for some backpay, but only if (and only for periods in which) they could prove that they were legally eligible to work in the United States.[1] Unlike in Sure-Tan, in

[1] The majority's assertion that the Supreme Court "made clear ... that [a compliance] hearing would determine 'the period of time theses particular employees might have continued working before apprehension by the INS'" Maj. Op. at 644-45 (quoting, *Sure-Tan*, 467 U.S. at 902, 104 S.Ct. 2803), is founded on a quotation uprooted from all context. The Supreme Court phrase encompassed in the majority's text comes from footnote 11 and was not in a discussion of what a future compliance hearing would have determined, but rather a descriptive passage setting forth what had transpired before the Supreme Court's review. It was specifically offered to rebut the conclusion of dissenting Justice Brennan "that the Court of Appeals had estimated the proper minimum backpay award with a fair degree of precision." *Id.* (quoting *Sure-Tan*, 467 U.S. at 909, 104 S.Ct. 2803) (internal quotes imitted).

Hoffman's case there is no factual question—Castro was lawfully unavailable throughout the backpay period and, thus, consistent with the Court's instruction in *Sure-Tan*, not entitled to receive any backpay.

Finally, the majority argues that "the sentence ... form[s] no part of *Sure-Tan*'s holding...." Maj. Op. at 644. I take this as being a tactful way of saying: "all right, the Supreme Court said it, but it's just *dicta*, we don't have to go by it." I find that singularly unimpressive. As we have observed in the past, "because 'carefully considered language of the Supreme Court, even if technically *dictum*, generally must be treated as authoritative,' this court cannot ignore the unmistakable import of [a Supreme Court decision's] analysis." *United States v. Oakar*, 111 F.3d 146, 153 (D.C.Cir.1997) (citations omitted). Or, as we have elsewhere stated, "Supreme Court dicta tends to have somewhat greater force—particularly when expressed so unequivocally." *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 662 (D.C.Cir.1996.

In a different context, prior dissenters to an en banc decision once lamented that the majority had discarded Supreme Court language "as mere 'dicta,'" saying, "In our view it is quite presumptuous for members of an inferior court to dismiss a decision of the Supreme Court in so cavalier a manner." Hubbard v. Administrator, EPA, 982 F.2d 531, 540 (D.C.Cir.1992) (en banc) (Edwards, J., dissenting). Just so here. The Supreme Court has told us that "employees must be

deemed unavailable for work and the accrual of backpay tolled during any period when they were not lawfully entitled to be present and employed in the United States." Indeed, this statement is more than dicta—rather, it was an unequivocal instruction for the Board to follow in its compliance proceeding on remand. I would not dismiss the Supreme Court's instruction in so cavalier a manner as does the majority.

In the end, I submit the Supreme Court has mad clear the state of laws: "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." Read in context, read out of context, or read both ways and compared, the majority is left with no way of dealing with the High Court's plain statement. I invite the reader to review the phrase "not lawfully entitled to be present and employed" in its original context. I further suggest that contextual illumination for this sentence of the High Court's opinion is supplied in the Court's analysis of the Seventh Circuit decision that it was reversing. The High Court described that decision as "[r]ecognizing that the discharged employees would most likely not have been lawfully available for employment and *so would receive no backpay award at all*...." *Sure-Tan*, 467 U.S. at 890, 104 S.Ct. 2803 (emphasis added). Thus, the governing factor in determining eligibility for backpay awards is not mere presence, but also the lawful entitlement to be present and to be employed.

The majority's construction of the phrase "not lawfully entitled to be present and employed in the United States" is tantamount to rewriting it to read "not present, and not lawfully entitled to be present, in the United States." In effect, it adds the "not present" limitation and deletes the "not lawfully entitled to be...employed" requirement. That rewriting of *Sure-Tan* leads the majority astray.

The erroneous construction of Sure-Tan endorsed by the majority appears to have first occurred in Bevles Co. v.

Teamsters Local 986, 791 F.2d 1391, 1393 (9th Cir. 1986). Before that time, even its critics believed that Sure-Tan meant what it said. *See Sure-Tan*, 467 U.S. at 911, 104 S.Ct. 2803 (Brennan, J., dissenting) (criticizing the majority for holding that undocumented aliens in Felbro, who had remained in the country, would be affected by Sure-Tan); Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d at 705, 725 (9th Cir.1986) ("Felbro") (Beezer, J., dissenting in part); Terry A. Bethel, Recent Labor Law Decisions of the Supreme Court, 45 MD L.REV. 179, 196 (1986) ("Sure-Tan...deprive[s] undocumented employees of any effective remedy for unlawful discrimination...."); Lucinda M. Cardinal, Note, *Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce*, 7 CARDOZO L.REV. 223, 224 (1985) ("*Sure-Tan* mandates that illegal aliens do not receive the remedies granted their legal coworkers."); John W. Sagaser, Note, *Rights Without a Remedy—Illegal Aliens Under the National Labor Relations Act*, 27 B.C. L.REV. 407, 452 (1986) ("By denying a minimum backpay award, the Court in effect deprives illegal alien workers of any remedy."). In *Belves*, the Ninth Circuit was reviewing an arbitrator's award; the issue was whether the arbitrator's decision showed a "manifest disregard of the law," and the court was not entitled to reverse simply erroneous legal conclusions. See 791 F.2d at 1392-93 & n.2. In not following *Sure-Tan*, the court ignored the lawful presence requirement and considered whether the aliens in that case were lawfully entitled to be employed. The Bevles court relied on the fact that—prior to the passage of IRCA—it was not a criminal act for employers to hire undocumented aliens. *See id.* at 1393. The court also considered the effect of section 2805 of the California Labor Code, which prohibited employers from knowingly employing undocumented aliens if it would affect lawful workers. Because an unreversed state court decision had previously held section 2805 unconstitutional, the court did not fault the arbitrator for disregarding it. *See id*, at 1393-94.

The focus on the lawful right to grant employment continued in *Felbro*. The Ninth Circuit there again relied on the fact that it was not illegal for an employer to hire undocumented aliens. Because the Sure-Tan employees could not lawfully reenter the United States, the court noted that they were "unavailable for work during the backpay period." Felbro, 795 F.2d at 719. The court reasoned that being illegally present in the United States did not create unavailability because "[t]here is no provision 'in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.'" *Id.* (quoting *Sure-Tan*, 467 U.S. at 892-93, 104 S.Ct. 2803).

Since the passage of IRCA, both the Second and the Ninth Circuits have registered concern over IRCA's effect on their misguided attempts to limit Sure-Tan.In Rios v. Enterprise Ass'n Steamfitters Local Union 638, 860 F.2d 1168 (2d Cir. 1988), the Second Circuit was careful to explain that recovery was only permissible because the claimants were "available for employment during the entire period covered by the backpay order, since such employment would have violated no immigration law." *Id.* at 1173. The court explicitly reserved the question of whether IRCA would affect later claims. *See id.* at 1172 n. 2. The Ninth Circuit likewise has questioned the viability of its *Felbro* decision after IRCA. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517-18 n. 11 (9th Cir.1989). In a further Second Circuit case postdating the enactment of IRCA, that circuit continued to follow its pre-enactment precedent. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir.1997). However, as Judge Jacobs clearly demonstrated on dissent, without the slender reed of the employer's legal capacity to hire undocumented aliens, "an undocumented alien is not '*lawfully* available for employment.'" *Id.* at 62 (Jacobs, J., dissenting) (quoting *Sure-Tan* and IRCA." *Id.*

Like the Second Circuit in *A.P.R.A. Fuel*, the majority today offers nothing that should lead us to believe that the

Supreme Court in *Sure-Tan* meant anything other than what it said; and what it said disqualifies the illegal alien in this case from an award of backpay.

In Sure-Tan the Court emphasized, "[W]e remain bound to respect the directives of the INA as well as the NLRA and to guard against judicial distortion of the statutory limits placed by Congress on the Board's remedial authority." Sure-Tan, 467 U.S. at 904 n. 13, 104 S.Ct. 2803. Likewise, we are bound by the statutory directives of IRCA. Those directives prohibit employers from hiring illegal aliens, see 8 U.S.C. § 1324a(a)(1)-(2), (e), (f), and make it a crime for illegal aliens to obtain employment using "an identification document knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] . . . that the document is false," 18 U.S.C. § 1546(b); see also 8 U.S.C. § 1324a(b)(c)(ii) (1988). The majority opinion essentially ignores these directives, instead pointing out that "employee misconduct" and an employee's providing a "false excuse for tardiness" while under oath, ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994), do not necessarily bar backpay awards. These points are inapposite–in this case, federal statutes clearly prohibited Castro from even obtaining a job.[2]

Instead of confronting these statutes directly, the majority chooses to mediate between statutory "goals." This Court's divination of what were the legislature's goals should never be allowed to trump what the legislature actually said. And what the legislature actually said is clear. Despite what this Court's policy preferences may be, those preferences "cannot justify the judicial arrogation of remedial authority not fairly encompassed within the [NLRA]" as interpreted by

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[2] This distinguishes the circumstance before us from that in ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 114 S.Ct. 835, 127 L.ed.2d 152 (1994), relied upon by the majority. See Maj. Op. at 649. The perjury statute provides for criminal sanctions; it does not forbid a present or potential perjurer from obtaining a job.

the Supreme Court in *Sure-Tan*, 467 U.S. at 904, 104 S.Ct. 2803.

Conclusion

The majority discusses at length the incentives and counter-incentives of backpay awards to illegal aliens from employers who could not legally employ them. While I do not think that law-and-economics analysis to be controlling or particularly helpful in this case, I would observe that it seems at least passing strange to think that Congress would outlaw the making of a particular type of contract between two types of individuals (United States employers and undocumented aliens) and then expect the courts to impose remedies that compel one of the parties to the disfavored contract to pay money to the other. I cannot see how those incentives could be much other than a complete wash.

For reasons set forth above, I respectfully dissent.

GINSBURG, Circuit Judge, dissenting;

I join Judge Sentelle's dissent insofar as he demonstrates that in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 782 (1984), "the Supreme Court has definitively answered the question before us." Dissent at 652. The court before us." Dissent at 652. The court today simply cannot convincingly evade the High Court's clear statement that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903, 104 S.Ct. 2803.

Because I believe that Sure-Tan is controlling, I do not think it necessary to reach the question whether the Board reasonably reconciled the remedial scheme of the NLRA with the policies embodied in the IRCA.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 13, 1999 Decided March 17, 2000

No. 98-1570

HOFFMAN PLASTIC COMPOUNDS, INC.
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board

Maurice Baskin argued the cause and filed the briefs for petitioner.

Sharon Block, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were *Linda Sher*, Associate General Counsel, *Aileen A Armstrong*, Deputy Associate General Counsel, and *Fred L. Cornell*, Attorney. *John D. Burgoyne*, Deputy Associate General Counsel, entered an appearance.

Marsha S. Berzon argued the cause for amicus curiae American Federation of Labor and Congress of Industrial Organizations. With her on the brief were *Jonathan P. Hiatt* and *Janws B. Coppess*.

Before: ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL

Dissenting opinion filed by *Circuit Judge* SENTELLE

TATEL *Circuit Judge:* Petitioner illegally fired several workers in retaliation for attempting to organize a union. Finding multiple unfair labor practices, the National Labor Relations Board ordered its traditional remedy, reinstatement with backpay, for all discharged employees. When the Board learned that one of these employees was an undocumented alien, it denied him reinstatement and terminated his backpay as of the date the employer discovered he was unauthorized to work. Challenging even this reduced award, the employer claims that awarding any backpay to undocumented workers conflicts with immigration law. Because the Supreme Court has held that undocumented workers are protected by the National Labor Relations Act, and because the limited remedy awarded here is within the Board's discretion and furthers the purposes of both labor and immigration law, we deny the petition for review and grant the cross-application for enforcement.

I

This case lies at the intersection of two statutory schemes: labor and immigration. Enacted in 1935, the National Labor Relations Act encourages collective bargaining, promotes industrial peace, and protects workers' rights of association, self-organization, and representation. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182-85 (1941). The statute vests the NLRB with broad discretion to enforce the Act and to remedy unfair labor practices. See 29 U.S.C. § 160(c). Not limited to "the correction of private injuries" or the "adjudication of private rights," the Board "acts in a public capacity to give effect to the declared public policy of the Act." *Phelps Dodge*, 313 U.S. at 192-93. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Id.* at 197. Awards of backpay not only make disciminatees whole, but "also

achieve a public purpose by deterring future similar unlawful practices, and by depriving employers of any competitive advantage they may have secured by acting unlawfully." *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705, 718 (9th Cir. 1986) *("Felbro")*.

Like the NLRA, the nation's immigration laws preserve jobs and safeguard American workers' wages and employment conditions. *See INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 & n.8 (1991); *Sure-Tan Inc., v. NLRB*, 467 U.S. 883, 893 (1984). Until 1986, the Immigration and Nationality Act was primarily concerned "with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Sure-Tan*, 467 U.S. at 892 (quoting *DeCanas v. Bica*, 424 U.S. 351, 359 (1976)). The Immigration Reform and Control Act of 1986 focused new immigration control efforts on employers. The Act makes it unlawful to employ anyone *known* to be an unauthorized alien, requires employers to verify and document the work eligibility of new hires, and authorizes sanctions against employers who violate the Act. *See* 8 U.S.C. § 1324a.

The NLRB and the courts have sought to ensure that labor and immigration laws operate in tandem. They have held that all employees, regardless of immigration status, have the right to organize and are entitled to protection from unfair labor practices. In *Sure-Tan*, for example, the Supreme Court affirmed a Board decision that extended the protections of the NLRA to undocumented workers. In addition to relying on the text of the Act, which broadly defines covered employees, the Court pointed to the common policies driving both labor and immigration law:

> Application of the NLRA [to undocumented workers] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under

> the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

467 U.S. at 893-94. According to the Court, protecting undocumented aliens from unfair labor practices not only is "clearly reconcilable with," but indeed "serves the purposes of" the immigration laws. *Id.* at 894; *see also NLRB v. Kolkka*, 170 F.3d 937, 940 (9th Cir. 1999). At the same time, the Court emphasized that while the NLRA protects undocumented workers, the Board's remedies for unfair labor practices must not conflict with immigration law. *See Sure-Tan*, 467 U.S. at 902.

Petitioner Hoffman Plastic Compounds, Inc. manufactures custom-formulated polyvinylchloride pellets for use by customers who produce pharmaceutical, construction, and household products. In May, 1988, Jose Castro began working in Hoffman's production plant earning minimum wage as a compounder, an operator of large blending machines that mix and cook the plastic formulas ordered by customers. When the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO began an organizing drive at Hoffman's factory, Castro, along with several other employees, distributed union authorization cards to coworkers. After what the Board later described as "coercive and restraining" interrogation of union supporters, Hoffman laid off each employee who had engaged in organizing activities, including Castro. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100 (1992).

When Hoffman received notice from the NLRB that the Union had filed a representation petition, it made some attempt to recall the discharged workers. A March 10, 1989 letter from Hoffman to Castro stated "[i]t looks like we'll need a few men soon" and asked him to contact his former supervisor "no later than 4 P.M., Monday, March 13, 1989."

Hoffman Plastic Compounds, Inc., 326 N.L.R.B. No. 86 (1998). Castro never responded.

After one of the discharged employees filed charges with the Board, an Administrative Law Judge found that Hoffman had engaged in multiple unfair labor practices. The Board adopted the ALJ's findings, concluding not only that the company had unlawfully interrogated employees about their union activities and sympathies, but that "in order to rid itself of known union supporters, [Hoffman] discriminatorily selected union adherents for layoff" in violation of Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1), (3). *Hoffman Plastic*, 306 N.L.R.B. at 100. The Board ordered Hoffman to cease and desist from such unfair labor practices, to post a notice at the work site, and to reinstate and make whole those union supporters it had illegally fired.

When a dispute arose as to the proper computation of backpay, a compliance proceeding was held before another ALJ. Castro appeared at the hearing, testifying through an interpreter. When Hoffman's attorney began to question Castro about his citizenship and authorization to work in the United States, the Board's General Counsel objected. The ALJ sustained the objection, but not before Castro had stated that he was a Mexican national and that the birth certificate he had used to gain employment at Hoffman was borrowed from a friend. On the basis of this admission, the ALJ recommended neither reinstatement nor backpay for Castro. *See Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685 (1994).

While the ALJ's recommendation was under consideration by the NLRB, the Board decided another case involving undocumented discriminatees, *A.P.R.A Fuel Oil Buyers Group*, 320 N.L.R.B. 408 (1995), *enforced* 134 F.3d 50 (2d Cir. 1997). There, the Board modified its standard remedy of reinstatement with backpay to account for the fact that the illegally fired workers lacked documentation. The Board conditioned its reinstatement order on the discriminatees' ability to verify their eligibility to work. It

also ordered that the backpay period terminate either when the discriminatees were lawfully reinstated or when they failed to produce the necessary employment eligibility documents within a reasonable period of time.

Issuing its Second Supplemental Decision and Order in this case, the Board adapted the remedy it had developed in *A.P.R.A. Fuel* to Castro's situation, denying reinstatement due to his undocumented status and awarding only limited backpay. *See Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. No. 86 (1998). To determine the backpay period, the Board first considered whether Hoffman's "[i]t looks like we'll need a few men soon" letter amounted to a specific and unequivocal offer of reinstatement that would toll backpay. Answering this question in the negative, the Board nonetheless allowed Hoffman the benefit of the after-acquired evidence defense and terminated the backpay period as of June 14, 1993, the date Hoffman learned that Castro had misrepresented his immigration status.

Hoffman now petitions for review of the Board's final order. The company does not challenge the Board's findings that it illegally discharged known union organizers and committed other unfair labor practices. It contests only Castro's limited backpay award, arguing that 1) *Sure-Tan* holds that undocumented aliens may never be awarded backpay; 2) IRCA prohibits backpay awards to undocumented workers; and 3) the Board misapplied the after-acquired evidence rule and violated the equal protection guarantee of the Fifth Amendment by giving undocumented workers preferential treatment. Cross-petitioning for enforcement, the NLRB, supported by amicus AFL-CIO, responds that the award of limited backpay to Castro is prohibited by neither *Sure-Tan* nor IRCA and falls well within the Board's broad remedial discretion. Indeed, the Board contends, the limited backpay award furthers the purposes of both labor and immigration law.

Before considering these issues, we register our disagreement with Hoffman's characterization of this case as

a dispute between "an innocent employer" and an employee who has no legal right to be in this country and who obtained his job through fraud. To be sure, the Board did find the evidence insufficient to conclude that Hoffman violated IRCA by hiring Castro knowing him to be an unauthorized alien. At the same time, however, the Board found that Hoffman had committed multiple unfair labor practices by interrogating, intimidating, and ultimately discharging union supporters. Hoffman neither contests these findings nor disputes that it failed to comply with the Board's order to reinstate Castro before his ineligibility for employment became known, when to do so would have ended the company's backpay liability without violating IRCA. *See* 8 C.F.R. § 274a.2(b)(viii)(A)(3), (5) (exempting employer from re-verifying an employee's eligibility for continuing employment after a temporary layoff or reinstatement after unjustified suspension or wrongful termination). And while it is true that Castro lied when falsely attesting to his work eligibility on the I-9 form and when identifying himself as "Jose Castro" in his sworn testimony at the compliance proceeding, the Supreme Court has held that a discriminatee's dishonesty does not preclude an award of backpay to remedy unfair labor practices. *See ABF Freight System Inc. v. NLRB*, 510 U.S. 317 (1994). Moreover, Castro's use of another's birth certificate to obtain employment did not violate IRCA at that time. See Immigration Act of 1990, Pub. L. No. 101-649, § 544, 104 Stat. 4978, 5059 (1990), codified at 8 U.S.C. § 1324c(a)(3) (amending IRCA to prohibit the use of documents issued to a person other than the possessor). Thus the precise issue before us is this: Did Castro's undocumented status-as opposed to his lying about it-render him entirely ineligible to obtain backpay as a remedy for Hoffman's serious and undisputed violations of the National Labor Relations Act?

II

We begin with Hoffman's argument, embraced by our dissenting colleague, that this ease is controlled by a single sentence from the Supreme Court's opinion in *Sure-Tan v.*

NLRB: "[I]n computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Sure-Tan*, 467 U.S. at 903. This sentence, Hoffman claims, "plainly prohibits" the NLRB from awarding even limited backpay to undocumented workers victimized by unfair labor practices. Read literally and divorced from its context, the sentence could well be interpreted to support that view. But determining whether particular Supreme Court language amounts to binding precedent is not so simple. The Court itself has warned against "dissect[ing] the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Instead, we must read the allegedly controlling sentence in context, taking account of the facts of the case, the issues presented, and the Court's reasoning and holding. "The Court's every word and sentence cannot be read in a vacuum; its pronouncements must be read in light of the holding of the case and to the degree possible, so as to be consistent with the Court's apparent intentions and with other language in the same opinion." *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc). With this perspective in mind, and with the Court's entire backpay discussion at our fingertips *(see* Appendix A)-the sentence on which Hoffman relies appears in the penultimate paragraph-we turn to the task of elucidating *Sure-Tan* and determining whether it controls this case.

The employer in *Sure-Tan* attempted to invalidate a union election by notifying the Immigration and Naturalization Service that several employees were undocumented. In response, the INS arrested five of the workers, all of whom agreed to return to Mexico to avoid deportation. "By the end of the day, all five employees were on a bus ultimately bound for Mexico." *Sure-Tan*, 467 U.S. at 887.

An ALJ found that the employer had violated the NLRA by constructively discharging its undocumented workers in retaliation for their union support. Because the ALJ thought that the discriminatees' return to Mexico rendered reinstatement "at best an unlikely prospect," he recommended holding the reinstatement offers open for six months to permit them to return lawfully. And since their absence from the country left the discriminatees "unavailable for employment" and therefore ineligible for backpay under standard NLRB policy, the ALJ suggested a minimum award of four weeks pay to each discriminatee to provide some measure of compensation for the discharged employees and to deter the employer. *Sure-Tan Inc.*, 234 N.L.R.B. 1187,1192 (1978).

Although the Board agreed that the company had violated the NLRA, it rejected the ALJ's recommended minimum remedy as "unnecessarily speculative" because no evidence supported his assumption that the discriminatees were not already back in the country and once again available for work. *Id.* at 1187. The Board instead ordered its usual remedy of reinstatement with backpay, leaving for a future compliance proceeding the determination of each employee's availability for work and the calculation of backpay. *Id.* In doing so, the Board reiterated two standard rules: "[t]he backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer," and discriminatees "found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly." *Sure-Tan Inc.*, 246 N.L.R.B. 788, 788 (1979). One dissenting member urged the Board to "clarify" that reinstatement offers should be available only to discriminatees who reenter the country lawfully. *Id.* at 791. A second dissenter urged that the backpay period run only from the date of the constructive discharge to the date the discriminatees left the country. *Id.*

The Seventh Circuit upheld the Board's decision and enforced its order, with a few modifications. To guard against the possibility that the discriminatees "might be motivated to

reenter the United States unlawfully to claim reinstatement and backpay," *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 603 (7th Cir. 1982), the court directed that the reinstatement offers be made conditional upon legal reentry, that they be sent in Spanish by verified delivery to the discriminatees' addresses in Mexico, and that they remain open for at least four years to afford the workers an opportunity to return lawfully and reclaim their jobs. *See id.* at 606. Using language later adopted by the Supreme Court and now relied on by Hoffman, the court also modified the Board's order by stating that "in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Id.* Sharing the ALJ's concern that the discriminatees, having left the country immediately after their discharge with no prospect of lawful return, might receive no backpay at all, thus leaving them uncompensated and the employer undeterred, and echoing the ALJ's original suggested minimum backpay award, the court directed the Board to modify the order to include a minimum award of six months' backpay to each discharged worker. Six months, the court said, represented an estimate of the minimum time "during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice. *Id.*

The Supreme Court agreed with the Board and the Seventh Circuit that undocumented workers are protected by the NLRA. It also agreed that the employer, by notifying the INS of the workers' immigration status, had committed an unfair labor practice. Sure-Tan, 467 U.S. at 895-96. Then, turning to the question of remedy, and repeatedly emphasizing the broad deference due the NLRB, the Court affirmed the Board's original order in all respects. Even a cursory review of the Court's discussion-readers might want to pause and read it for themselves *(see* Appendix A)-reveals that 1) whether undocumented workers are eligible to receive backpay was not an issue before the Court and 2) the only backpay issue the Court considered was whether the six-

month minimum award imposed by the Seventh Circuit was an unduly speculative estimate "not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Id.* at 901. At the very outset of its discussion, the Court states: "Petitioners attack those portions of the Court of Appeals' order which modified the Board's original order by providing for an *irreducible minimum of six* months' backpay for each employee and by detailing the language, acceptance period, and verification method of the reinstatement offers." *Id.* at 898 (emphasis added). Notice that the Court nowhere says that the employer argued, as does Hoffman, that the discriminatees were ineligible to receive backpay simply because they were undocumented. Notice also that the Court describes the sentence on which Hoffman places so much emphasis as merely repeating a limitation on backpay imposed by the Seventh Circuit, an issue that was neither challenged nor briefed by either the Board or the employer:

> Conditioning the offers of reinstatement on the employees' legal reentry and deeming the employees "unavailable" during any period when they were not lawfully present are requirements that were in fact imposed by the Court of Appeals in this case, and hence fully accepted by the Board .... The Board has clearly indicated its agreement with these portions of the Court of Appeals' remedial order by specifically noting that petitioners do not challenge these parts of the order [and] by limiting its own argument to the minimum backpay award issue alone . . .

Id. at 903 n.12. *See also id.* at 898 n.8; *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115,1123 (7th Cir. 1992) (Cudahy, J., dissenting). The sentence on which Hoffman relies was not even an issue before the Court.

Moreover, in setting aside the Seventh Circuit's six-month minimum award, the Court made clear that, contrary to Hoffman's argument, undocumented workers may receive backpay. To begin with, the Court said that it "generally

approve[s] the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceeding more specific calculations as to the amounts of backpay, if any, due these employees." *Sure-Tan*, 467 U.S. at 902. The Court explained that the discriminatees could receive backpay despite their illegal status so long as the amount reflected the actual time they might have continued working but for the employer's unfair labor practice. The Court did not fault the Seventh Circuit for awarding backpay to undocumented workers, nor for basing the award on the "minimum time during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice." *Id.* at 899 (internal quotation marks omitted). Instead, the Court held that the Seventh Circuit erred by picking the six-month period out of thin air. The "main deficiency" in the Seventh Circuit's order, the Court explained, was not that it awarded backpay to undocumented aliens, but that the *amount* of backpay awarded was "develop[ed] in the total absence of any record evidence as to the circumstances of the individual employees," thus violating the "cardinal" proposition "that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Id*, at 899-900 & n.9. The Court continued:

> [T]he Court of Appeals "estimated" an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence. In the absence of relevant factual information or adequate analysis, it is inappropriate for us to conclude, as does JUSTICE BRENNAN, that the Court of Appeals had estimated the proper minimum backpay award "with a fair degree of precision."

Id. at 901 n. 11. If as Hoffman argues undocumented workers may never be awarded backpay, the Court would not have mentioned "the proper minimum backpay award," "the period of time these particular employees might have continued working before apprehension by the INS," or "affording petitioners any opportunity to provide mitigating evidence." Nor would there have been any need for more "relevant factual information or adequate analysis," much less for a compliance proceeding to determine the amount of backpay actually due. In light of the fact that *Sure-Tan* does not bar undocumented workers from receiving backpay, what are we to make of the sentence on which Hoffman and our dissenting colleague place so much emphasis? The answer is that the Court intended the sentence to guide the Board on remand in dealing with the unique circumstances of the *Sure-Tan* employees. Recall that the *Sure-Tan* discriminatees, unlike Castro, had left the country. Having approved the Board's general order of reinstatement with backpay, and having remanded for compliance proceedings to calculate the amount of backpay due, the Court went on to agree with the Seventh Circuit that whatever specific remedy the Board might formulate must not encourage the disciiminatees to re-enter the country illegally. The INA's "central concern," the Court pointed out, was regulating "admission to the country." *Id.* at 892. The Court therefore added the paragraph in which Hoffman's sentence appears:

> [A]s the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally important Congressional objective-to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. *Similarly, in computing backpay, the employees must be deemed "unavailable" for work*

(and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

Id. at 902-03 (emphasis added) (internal quotation marks and citation omitted). Notice that the first sentence refers to "the employees' legal readmittance to the United States." *Id.* at 903. The second sentence mentions "deterring unauthorized immigration." *Id.* The third again refers to "the employees' legal reentry." *Id. So* when in the final sentence the Court mentions employees "not lawfully entitled to be present and employed in the United States," it must be referring only to *those particular* Sure-Tan employees who had left the country and could not lawfully return.

Indeed, the sentence makes sense only *because* the *Sure-Tan* discriminatees had left the country. As the Court itself pointed out, although the employees were illegally present in the United States while working for the company, it was not unlawful for the company to have employed them. *Id.* at 892-93. Because their employment was not prohibited, it cannot be said that they were "not lawfully entitled to be present *and employed* in the United States." Not until the discriminatees left the country-at which point they could not have been reinstated without reentering in violation of immigration law-did they become "not lawfully entitled to be *present and employed* in the United States." And for the same reason, not until they left the country did the discriminatees lose their "legal availability for work." Id at 904.

To sum up, in light of *Sure-Tan's* reasoning and its holding that undocumented workers are protected by the NLRA and may in fact receive properly tailored awards of backpay, we must reject Hoffman's interpretation of the sentence. Reading it to bar all backpay to undocumented workers would expand a snippet of dicta well beyond the unique facts of *Sure-Tan* to create a blanket rule that, in addition to conflicting with *Sure-Tan* itself, would undermine the purposes of awards both immigration and labor law. *See infra* at 21-23. What we said in *Aka*, where we also refused to

adopt "an unqualifiedly literal reading" of an isolated passage from a Supreme Court opinion, applies here as well: Hoffman's interpretation would not carry out the Court's true purpose." 156 F.3d at 1291. Read properly, the sentence simply reminds the Board that the remedies it fashions for unfair labor practices must not encourage violations of immigration law.

Two of the three Circuits that have addressed this issue agree with our interpretation of *Sure-Tan*. In *Felbro*, the Ninth Circuit stated: "In *Sure-Tan*, the Supreme Court did not address the issue whether undocumented workers remaining at work in the United States throughout the backpay period are entitled to backpay awards. *Sure-Tan* barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers." 795 F.2d at 722. To be sure, in a later case also upholding an award of backpay to undocumented workers, the Ninth Circuit added a footnote speculating whether the enactment of IRCA might "change[] the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover backpay." *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n.11 (9th Cir.1989). As we explain in the following section, however, IRCA's enactment did not alter the labor and employment law protections afforded undocumented workers. The Ninth Circuit, moreover, has never repudiated *Felbro's* and *Hacienda Hotel's* holdings that backpay can be awarded to undocumented workers. Indeed, the Ninth Circuit and its district courts have consistently reaffirmed that undocumented workers continue to be protectedby labor and employment laws after IRCA and have continued to award them backpay. *See, e.g., Kolkka*, 170 F.3d 937; *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998); *Escobar v. Baker*, 814 F. Supp. 1491, 1498 (W.D. Wash. 1993); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991). Likewise, in *A.P.R.A Fuel*, the Second Circuit held that *Sure-Tan* bars awards of backpay only to those undocumented employees

who are unavailable for work because they are outside the country and unable to lawfully reenter. *See A.P.R.A Fuel*, 134 F.3d at 54-55. *But see Del Rey Tortilleria*, 976 F.2d at 1120-21 (interpreting *Sure-Tan* as imposing a blanket prohibition on backpay awards to undocumented workers).

* * *

Hoffman next argues that even if *Sure-Tan* does not bar backpay to undocumented aliens, the Immigration Reform and Control Act of 1986 does. IRCA, it will be recalled, "establishe[d] penalties for employers who *knowingly* hire undocumented aliens, thereby ending the magnet that lures them to this country." H.R. Rep. No. 99-682(1) at 45-46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649-50 (emphasis added). In addition to employer sanctions, *see 8 U.S.C.* § 1324a(a), IRCA establishes procedures by which employers must verify employee eligibility to work, *see 8 U.S.C.* § 1324a(b), and makes it unlawful for employers to discriminate against authorized workers on the basis of citizenship or national origin, *see 8* U.S.C. § 1324b. Because undocumented workers "live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords," IRCA established amnesty procedures to legalize the status of undocumented workers illegally present in the country, allowing them "to contribute openly to society and ... help[ing] to prevent the exploitation of this vulnerable population in the work place." H.R. Rep. 99-682(I) at 49, 1986 U.S.C.C.A.N. at 5653.

According to Hoffman, "the plain intent of IRCA" was to prevent the Board from awarding rundocumented workers backpay. The Board interprets IRCA differently. It argues that far from barring backpay awards, IRCA preserves the NLRA's "protections and remedies for undocumented aliens as one of many useful tools in a multifaceted strategy" to reduce illegal immigration by aiming at its "economic roots."

Two principles guide our consideration of this issue. First, while the Board's formulation of remedies for NLRA

violations merits the highest level of deference, *see ABF Freight*, 510 U.S. at 324, we owe no deference to its interpretation of IRCA. *See, e.g., New York Shipping Assn v. Federal Maritime Comm'n*, 854 F.2d 1338, 1365 (D.C. Cir. 1988) (agency interpretation of a statute it does not administer is entitled to no deference). Second, in enforcing the NLRA, the Board may not

> ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942). If a conflict requires the Board "to accommodate the policies of another statutory regime within the framework of the legislation it administers," it "must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute." *New York Shipping*, 854 F.2d at 1367. "[A]n agency, faced with alternative methods of effectuating the policies of the statute it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of other statutory regimes, with which a conflict is claimed; and (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime." *Id.* at 1370. This is precisely what the Board has done.

To begin with, we agree with the Board that nothing in IRCA bars awards of limited backpay to remedy unfair labor practices against undocumented workers. Hoffman itself acknowledges that IRCA neither amends nor repeals the NLRA or any other labor law. The House Judiciary

Committee Report, moreover, expressly states that IRCA's employer sanctions provisions are not intended to

> be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the [NLRA], as amended, or of the rights and protections stated in Sections 7 and 8 of that Act.

H.R. Rep. 99-682(I) at 58, 1986 U.S.C.C.A.N. at 5662. The Judiciary Committee relied on *Sure-Tan* to support its view that continued protection of undocumented workers under the labor laws is fully consistent with IRCA's goals:

> As the Supreme Court observed in *Sure-Tan*, application of the NLRA [to undocumented workers] "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."

Id. (internal citation omitted). Echoing this view, the House Education and Labor Committee Report states that no provision of the law should

> limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, *the National Labor Relations Board*, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities

> protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R. Rep. No. 99-682(11) at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5758 (emphasis added). Not only does this legislative history make clear that IRCA imposed no limits on labor law protections for undocumented workers, but the statute itself authorized supplemental appropriations to the Department of Labor for expanded enforcement of existing labor standards and practices "in order to deter the employment of unauthorized aliens and remove the economic incentives for employers to exploit and use such aliens." Pub. L. No. 99-603, § 111(d), 100 Stat. 3359 (1986). If as Hoffman argues IRCA limited labor law protection for undocumented workers, it hardly seems likely that IRCA would have simultaneously authorized additional funds to enforce the labor laws.

In formulating remedies for unfair labor practices committed against undocumented workers, moreover, the Board has not "ignore[d] other and equally important Congressional objectives." *Southern Steamship*, 316 U.S. at 47. To the contrary, it has "fully enforce[d] the requirements of its own statute [the NLRA] in a manner that minimizes the impact of its actions on the policies of the other statute [IRCA]." *New York Shipping*, *854* F.2d at 1367. In its first post-IRCA case, *A.P.R.A Fuel*, the Board observed that the NLRA and IRCA share "virtually identical policy objectives with respect to the American workplace," and concluded that it "can best achieve this mutuality of purpose and effect by vigorously enforcing the NLRA, including providing traditional Board remedies, with respect to all employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or indviduals." *AP.R.A Fuel*, 320 N.L.R.B. at *415*, *411*. "To do otherwise," the Board explained, "would increase the incentives for some unscrupulous employers to play the

provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity. Thus, these employers would be free to flout their obligations under the Act, secure in the knowledge that the Board would be powerless fully to remedy their violations." *Id*, at 415. Taking account of these common statutory goals, the Board in *AP.R.A Fuel* ordered its usual remedy of reinstatement with backpay but imposed two limitations to avoid any conflict with the policies underlying IRCA: it conditioned reinstatement on compliance with IRCNs employment eligibility verification requirements and terminated backpay when the disetiminatees either are lawfully reinstated or, after a reasonable period of time, fail to produce the required employment documents. *See id.* (citing *NLRB v. Future Ambulette*, Inc., 903 F.2d *140, 145* (2d Cir. 1990) (conditioning reinstatement of a driver whose license had been suspended on his presentation of a valid driver's license within a reasonable period of time and placing a time limit on backpay liability to prevent the employer from being tempted to rehire the driver before he obtained a valid license)). According to the Board, this remedy-conditional reinstatement combined with limited backpay-best reconciles the goals of the NLRA and IRCA. *See A.P.R.A. Fuel*, 320 N.L.R.B. at 416; *see also Regal Recycling, Inc., 329* N.L.R.B. No. 38 (1999); *County Window Cleaning Co.*, 328 N.L.R.B. No. 26 (1999); *Intersweet Inc.*, 321 N.L.R.B. 1 (1996).

Courts and administrative agencies agree that IRCA does not limit labor law protections afforded undocumented workers. Enforcing the Board's *AP.R.A. Fuel* remedy, the Second Circuit held "without hesitation that IRCA did not diminish the Board's power to craft remedies for violations of the NLRA, provided that the Board's remedies do not conflict with the requirements of iRCA." *NLRB v. AP.R.A Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir. 1997). Withholding backpay from undocumented workers would, the court explained, undermine the purposes of both IRCA and the NLRA. It would conflict with IRCA because "precluding the remedy would increase the incentives for employers to

hire undocumented aliens," which would, in turn, increase the incentives that encourage illegal immigration. Withholding backpay would also frustrate collective bargaining lights of lawful U.S. workers under the NLRA, the court found:

> [T]he lack of a backpay remedy would make undocumented workers an easy target for employers resisting union organization, and, thus, frustrate the rights of lawful U.S. workers under the NLRA. An employer could intimidate United States citizens and other lawful residents by targeting undocumented workers for antiunion discharges. Or, alternatively, legal workers might be reluctant to organize in the first instance if the Board were unable to issue any remedy against illegal actions taken by employers against undocumented workers who support the union.

Id. at 58; *see also, e.g., Kolkka*, 170 F.3d at 941 (holding that IRCA does not limit the rights of undocumented workers to vote in union elections); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (llth Cir. 1988) (applying the FLSA to undocumented aliens to further IRCA's goal of "eliminating employers' economic incentives to hire" them); *Contreras*, 25 F. Supp. 2d at 1059-60 (continuing after IRCA to apply the FLSA to undocumented workers and to award them punitive damages, noting that "[t]he Ninth Circuit has taken the broader view of the *Sure-Tan* holding, upholding awards of back pay to undocumented aliens for wrongful employment practices if, during their time of discharge, the workers remained in the U.S. available for work, and the back pay period could be calculated with certainty"), *Escobar*, 814 F. Supp. at 1498 (holding that undocumented workers can recover damages for violations of the Migrant and Seasonal Agricultural Workers Protection Act, as amended by IRCA); *EEOC v. Switching System Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Title VII's protections extend to aliens who may be in this country either legally or illegally.") (post-IRCA); *Tortilleria "La Mejor,"* 758 F. Supp. 585 (holding that Title VII continues to apply to

undocumented workers after IRCA); EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002 (1999) (adopting the *AP.R.A Fuel* analysis and remedy for undocumented workers whose rights under Title VII, the Americans with Disabilities Act, the Rehabilitation Act, the Age Discrimination in Employment Act, or the Equal Pay Act are violated).

In contrast to the Board's limited backpay policy, Hoffman's position would undermine both IRCA and the NLRA. If employers are exempt from paying backpay to undocumented workers, they will favor undocumented over documented workers, thus increasing the incentives for unlawful immigration, precisely what IRCA is intended to prevent. As the Supreme Court said in *Sure-Tan,* "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws." 467 U.S. at 893-94. Denying backpay would likewise subvert the common policy underlying both IRCA and the NLRA, *ie.*, maintaining wages and working conditions for authorized employees. *Sure-Tan* made this point as well: "Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal-alien employees who are not subject to the standard terms of employment." *Id.* at 893. Finally, excusing employers from paying backpay to undocumented workers would undermine the collective bargaining rights of all employees, including authorized workers. *Sure-Tan* put it this way:

> If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the

> collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining. Thus, the Board's categorization of undocumented aliens as protected employees furthers the purposes of the NLRA.

Id, at 892 (internal citation omitted). Elaborating in *A.P.R.A. Fuel,* the Board explained that because "undocumented aliens are extremely reluctant to complain to the employer or to any of the agencies charged with enforcing workplace standards," they make easy targets for an employer's "unprincipled effort to stave off . . . union representation." *A.P.R.A. Fuel,* 320 N.L.R.B. at 414. Employers resisting unions could simply fire undocumented workers who try to organize and then raise "the unlawful immigration status of their discharged employees in retaliation for protected activities;" employers might even "consider the penalties of IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance." *Id.* at 415. This also harms the collective bargaining rights of authorized workers, the Board found, because "the continuous threat of replacement with powerless and desperate undocumented workers would certainly chill the American and authorized alien workers' exercise of their Section 7 rights," *Id.* at 414.

For all these reasons, we hold that the Board has fully satisfied its obligation to "accommodat[e] one statutory scheme to another." *Southern Steamship,* 316 U.S. at 47. The Board crafted its limited backpay remedy to avoid conflict with IRCA and to promote the purposes of both statutes. The remedy reduces employer incentives to prefer undocumented workers (IRCA's goal), reinforces collective bargaining rights for all workers (the NLRA's goal), and protects wages and working conditions for authorized workers (the goal of both Acts). Because these last two points reflect the Board's interpretation of the NLRA, we owe them considerable deference. *See, e.g., Sure-Tan,* 467 U.S. at 899 (warning that courts "should not substitute their judgment for that of the

Board in determining how best to undo the effects of unfair labor practices"). If as Hoffman believes the Board has struck the wrong balance between the two statutes, its remedy lies in Congress, not this court.

* * *

With this understanding of *Sure-Tan* and IRCA in mind, we return to the specific remedy the Board ordered in this case. To repeat, it denied Castro reinstatement altogether and limited his backpay to the period beginning with his unlawful termination and ending on the date Hoffman learned of his undocumented status. This remedy complies with *Sure-Tan* and IRCA in all respects.

First, unlike the Seventh Circuit's six-month minimum award in *Sure-Tan*, the Board's award of backpay to Castro was not at all speculative. The Board limited backpay to the period of time during which Castro could have continued worldng but for Hoffman's unfair labor practice. This represents precisely the kind of individual tailoring demanded by *Sure-Tan*. And unlike in *Sure-Tan*, the Board had no reason to worry that the remedy might encourage the discriminatee to re-enter the country illegally Castro had never left.

Second, the Board modified its usual *A.P.R.A Fuel* remedy in this case to ensure that Castro's award would not conflict with immigration law. Although the usual remedy includes reinstatement conditional on compliance with IRCA's verification provisions, the Board denied conditional reinstatement to Castro because, under IRCA, Hoffman's discovery of Castro's ineligibility to work would have required his termination. For the same reason, the Board ended Castro's backpay as of the date Hoffman discovered his true immigration status.

According to our dissenting colleague, requiring an employer to give backpay to an employee it cannot now lawfully hire "boggles the mind." *See infra.*, Sentelle, J., dissenting. It certainly would boggle the mind had the Board

ordered reinstatement, but it rejected that option. Instead it fashioned a limited remedy, carefully crafted to promote the goals of the NLRA without running afoul of IRCA. IRCA, as we pointed out above, does not make it unlawful for an *alien* to work; it makes it unlawful for an *employer* to hire "an alien knowing the alien is . . . unauthorized." 8 U.S.C. § 1324a(a)(1)(A). Having now discovered Castro's unauthorized status, Hoffman can no longer employ him lawfully. But at the time Hoffman hired Castro, it complied with IRCA, and from that date until it learned he is unauthorized, nothing prohibited his continued employment. It was to that period of Castro's lawful availability for employment that the Board limited the backpay award. Far from boggling the mind, this remedy fully complies with *Sure-Tan* and avoids any violation of IRCA.

III

Hoffman's additional arguments require little discussion. It claims that the Board misapplied the after-acquired evidence rule. According to Hoffman, Castro's undocumented status should have barred all backpay, not just backpay from the date Hoffman learned of Castro's status. For this proposition, Hoffman cites *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), but misreads the case. In *McKennon*, the lower court had dismissed a discharged employee's lawsuit under the Age Discrimination in Employment Act because the employer learned that the plaintiff had violated company policy by making unauthorized copies of sensitive documents. The Supreme Court reversed, squarely rejecting the lower court's conclusion that discovery of "wrongdoing which would have resulted in discharge bars employees from any relief' for employers' unlawful acts. *Id.* at 356. Rejecting "[a]n absolute rule barring any recovery of backpay," the Court held that the typical remedy should be "backpay from the date of the unlawful discharge to the date the new information was discovered." *Id.* Consistent with its longstanding policy, that is precisely what the Board ordered in this case. *See, e.g.*,

Marshall Durbin Poultry Co., 310 N.L.R.B. 68, 70 (1993), *enforced in pertinent part*, 39 F.3d 1312, 1317 (5th Cir. 1994); *John Cuneo, Inc.*, 298 N.L.R.B. 856, 857 (1990).

Equally without merit is Hoffman's argument that "[b]y awarding undocumented aliens backpay without any consideration regarding whether these individuals can mitigate their damages, the Board treats illegal aliens more favorably than documented workers and by doing so, the Board violates the equal protection clause of the Fifth Amendment to the United States Constitution." Not only do we doubt the company's standing to assert the equal protection rights of third parties, *see, e.g., Powers v. Ohio*, 499 U.S. 400, 410-16 (1991), but Hoffman points to no evidence that the Board applies a different mitigation standard to undocumented workers. In any event, the Board found that Castro had sought and obtained interim employment, thus fulfilling his duty to mitigate. The Board subtracted his interim earnings of almost $4,000 from the backpay award.

Finally, we think it worth repeating that Hoffman itself could have mitigated its backpay liability either by making a bona fide reinstatement offer in its letter recalling Castro a few weeks after it fired him, or by complying promptly with the Board's reinstatement order. *See supra* at 7. INS regulations issued pursuant to IRCA expressly permit reinstatement after an unlawful discharge without requiring the employer to reverify the employee's eligibility documents. *See* 8 C.F.R. § 274a.2(b)(viii)(A).

IV

The petition for review is denied, and the cross-application for enforcement is granted.

So ordered.

APPENDIX A

OCTBER TERM, 1983

IV

There remains for us to consider petitioners' challenges to the remedial order entered in this case. Petitioners attack those Portions of the Court of Appeals' order which modified the Boards' original order by providing for an irreducible minimum of six months' backpay for each employee and by detailing the language, acceptance period, and verification method of the reinstatement offers.[8] We find that the Court of Appeals exceeded its narrow scope of review in imposing both these modifications.

A

Section 10(c) of the Act empowers the Board, when it finds that an unfair labor practice has been committed, to issue an order requiring the violator to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the NLRA. 29 U.S.C. § 160(c). The Court has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review. See, e.g., *NLRB v. J. H. Rutter-Rex Mfg. Co.*,

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[8] Petitioners do not challenge the cease and desist order imposed by the Board and affirmed the Court of Appeals. Under such an order, petitioners will be subject to contempt sanctions should they again resort to the discriminatory tactics employed here. Nor do petitioners appear to challenge the courts modifications of the Boards remedial order conditioning acceptance of the reinstatement offers and the accrual of any backpay upon the discharged employees' legal presence in this country. See n. 12, *infra*.

396 U. S. 258, 262-263 (1969); *Fibreboard Paper Products Corp. v. NLRB*, 379 U. S. 203, 216 (1964); *Phelps Dodge Corp. v. NLRB*, *313* U. S. 1771 194 (1941). Although the courts of appeals have power under the Act "to make and enter a decree . . . modifying, and enforcing as so modified" the orders of the Board, 29 U.S.C. §§ 160(e), (f), they should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices:

> "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp., supra,* at 194.

See also *NLRB v. Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1963) (power to fashion remedies "is for the Board to wield, not for the courts").

Here, the Court of Appeals impermissibly expanded the Board's original order to provide that each discriminatee would receive backpay for at least six months on the ground that six months is a reasonable assumption" as to the "minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice." 672 F. 2d, at 606. We agree with petitioners that this remedy ordered by the Court of Appeals exceeds the limits imposed by the NLRA.[9]

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[9] Justice Brennan asserts that since the Board has "fully acquiesced" in the Court of Appeals' remedy, the case should be reviewed as if the Board itself had developed the remedial order. *See post*, at 907. 'This argument misses the mark on two levels. First, our traditional deference to such remedial orders is premised upon our appreciation that the Board has duly considered and brought to bear its "special competence" in fashioning appropriate relief in any given unfair labor practice case. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 261, 265-266 (1975). Given the disparity between the Board's original order and the Court of Appeals' modified order, that premise is patently inapplicable to this case. Moreover, the Board's mere acquiescence in the Court of Appeals' remedial order simply cannot correct the order's main deficiency-its development in the total absence of my record evidence as to the circumstances of the individual employees.

Not only did the court overstep the limits of its own reviewing authority, see *NLRB v. Seven-Up Bottling Co., supra*, at 346-347,[10] but it also effectively compelled the Board to take action that simply does not lie within the Board's own powers. Under § 10(c), the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders "effectuate the policies of the Act." Although this rather vague statutory command obviously permits the Board broad discretion, at a minimum it encompasses the requirement that a proposed remedy be tailored to the unfair labor practice it is intended to redress. Quite early on, the Court established that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *NLRB v. MacKay Radio & Telegraph Co.*, 304 U. S. 333, 348 (1938). See D. McDowell & K Huhn, NLRB Remedies for Unfair Labor Practices 8-15 (1976). Of course, the general legitimacy of the backpay order as a means to restore the situation "as nearly as possible, to that which would have obtained but for the illegal discrimination," *Phelps Dodge Corp.*, 313 U. S., at 194, is by now beyond dispute. Yet, it remains a cardinal albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the actual, and not merely *speculative*, consequences of the unfair labor practices. *Id.*, at 198 ("[Only actual losses should be made good . . ."). To this end, we have, for example, required that

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[10] In imposing a minimum backpay award, the Court of Appeals usurped the delegated function of the Board to decide how best to appraise the relevant factors that determine a just backpay remedy. The proper course for a reviewing court that believes a Board remedy to be inadequate is to remand the case to the Board for further consideration. *See supra*, at 899; *NLRB v. Food Store Employees*, 417 U. S. 1, 10 (1974).

the Board give due consideration to the employee's responsibility to mitigate damages in fashioning an equitable backpay award. See, e. g., *NLRB v. Seven-Up Bottling Co.*, *supra*, at *346; Phelps Dodge Corp. v. NLRB*, *supra*, at 198. Likewise, the Board's own longstanding practice has been to deduct from the backpay award any wages earned in the interim in another job, *see Pennsylvania* Greyhound Lines, *Inc.*, 1 N. L. R. B. 1, 51 (1935), enf'd, 91 F. 2d 178 (CA3 1937), rev'd on other grounds, 303 U.S. 261 (1938).

By contrast, the Court of Appeals' award of a minimum amount of backpay in this case is not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees. The court itself admitted that although it sought to recompense the discharged employees for their lost wages, the actual 6-month period selected was "obviously conjectural" 672 F. 2d at 606, The court's imposition of this minimum backpay award in the total absence of record evidence as to the circumstances of the individual employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA.[11]

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[11] We are also mindful that, prior to the instant case, the Board itself had never claimed the power given it here by the Court of Appeals. To our knowledge, the Board has never attempted to impose a minimum backpay award that the employer must pay regardless of the actual evidence as to such issues as an employee's availability for work or his efforts to secure comparable interim employment. In fact, in this very case, the Board had already rejected as "unnecessarily speculative" the ALJ's recommendation that a 4-week minimum period of backpay be awarded the discharged employees. 234 N. L. R. B., at 1187. The Board now argues that the Court of Appeals' backpay award involves no greater speculation than that which is normally involved in reconstructing what would have happened to certain employees but for their discriminatory discharge. *See, e.g., NLRB v. Superior Roofing Co.*, 460 F. 2d 1240 (CA9 1972) (*per curiam*); *Buncher v. NLRB*, 405 F. 2d 787 (CA3 1968), *cert denied*, 396 U.S. 828 (1969). In each of these cases, however, the courts enforced the Board's orders upon finding that the Board, in the course of compliance proceeding, had applied to particular facts a reasonable formula for determining the probable length of employment and compensation due and had permitted the employer to come forward with evidence mitigating

We generally approve the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees. This Court and other lower courts have long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge. See *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S., at *260; Nathanson v. NLRB*, 344 U.S. 25, 29-30 (1952); *Trico Products Corp. v. NLRB*, 489 F. 2d 347, 353-354 (CA2 1973). Cf. *Teamsters v. United States*, 431 U.S. 324, 371 (1977) (individual Title VII claims to be resolved at remedial hearings held by District Court on remand). These compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, if any, to which the discharged employees are individually entitled. See *NLRB v. Mastro Plastics Corp.*, 354 F. 2d 170 (CA2 1965), *cert. denied*, 384 U.S. 972 (1966); 3 NLRB Casehandling Manual § 10656 *et seq.* (1977) (preparation of backpay specification).

Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the

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liability. *See, NLRB v. Superior Roofing Co., supra*, at 1240-1241 (upholding use of a "seniority formula" to compute the earnings of a "representative employee" in a reasonable approximation of discharged roofer's earnings). In the instant case, the Court of Appeals "estimated" an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence. In the absence of relevant factual information or adequate analysis, it is inappropriate for us to conclude, as does JUSTICE BRENNAN, that the Court of Appeals had estimated the proper minimum backpay award "with a fair degree of precision," *see post*, at 909.

employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another "equally important Congressional objectiv(e)," *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)-to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore totled) during any period when they were not lawfully entitled to be present and employed in the United States. Cf 3 NLRB Casehandling Manual §§ 10612, 10656.9 (1977).[12]

The Court of Appeals assumed that, under these circumstances, the employees would receive no backpay, and

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[12] Conditioning the offers of reinstatement on the employees legal reentry and deeming the employees "unavailable" during any period when they were not lawfully present are requirements that were in fact imposed by the Court of Appeals in this case, and hence fully accepted by the Board. See 672 F.2d, at 606 ("Consistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States we modify the Board's order so as to make clear (1) that (except for the minimum backpay award) in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States . . . , App. to Pet. for Cert. 32a (modified order). Contrary to JUSTICE BRENNAN's assertion, *see post*, at 910, the Board does not argue that it would exempt these employees from its policy because their unavailability is directly attributable to the employer's own unfair labor practice. The Board refers to this limited exception to its normal rule solely to counter petitioners' suggestion that the minimum backpay award is somehow logically "inconsistent" with normal Board policies in calculating backpay. See Brief for Respondent 45, n. 44. The Board has clearly indicated its agreement with these portions of the Court of Appeals' remedial order by specifically noting that petitioners do not challenge these parts of the order, *see id.*, at 43, by limiting its own argument to the minimum backpay award issue alone, see *id.*, at 43-46, and, most importantly, by asking that the judgment below be affirmed in its entirety.

so awarded a minimum amount of backpay that would effectuate the underlying purposes of the Act by providing some relief to the employees as well as a financial disincentive against the repetition of similar discriminatory acts in the future. 672 F. 2d, at 606. We share the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able either to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period. The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act. Any perceived deficiencies in the NLRA's existing remedial arsenal can only be addressed by congressional action.[13] By directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or

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[13] According to JUSTICE BRENNAN, the Court stands guilty today of creating a "disturbing anomaly by, on the one hand, holding that undocumented aliens are "employees" within the meaning of the Act and so entitled to bring an unfair labor practice claim, but then, on the other hand, holding that these same employees are "effectively deprived of any remedy . . ." *See post*, at 911. This argument completely ignores the fact that today's decision leaves intact the cease and desist order imposed by the Board, see n. 7, *supra*, one of the Act's traditional remedies for discriminatory discharge cases. Were petitioners to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act. At the same time, we fully recognize that the reinstatement and backpay awards afford both more certain deterrence against unfair labor practices and more meaningful relief for the illegally discharged employees. Nevertheless, we remain bound to respect the directives of the INA as well as the NLRA and to guard against judicial distortion of the statutory limits placed by Congress on the Board's remedial authority. Any other solution must be sought in Congress and not the courts.

legal availability for work, the Court of Appeals plainly exceeded its limited authority under the Act.[14]

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[14] In light of our disposition of this issue, we find it unnecessary to consider petitioners' claim that the minimum backpay awards are "punitive," and hence beyond the authority of the Board under *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-12 (1940). We may thus avoid entering into what we have previously deemed "the bog of logomachy" as to what is "remedial" and what is "punitive." *NLRB v. Seven-Up Bottling Co.*, 844 U.S 344, 348 (1953).

SENTELLE, *Circuit Judge, dissenting:* In May of 1988, an undocumented alien having illegally entered the United States compounded his illegality when he fraudulently used the name and birth certificate of Jose Castro to obtain employment in the production plant of Hoffman Plastic. On January 31, 1989, the company laid off a number of employees supportive of a union organizing effort, including the employee (whose true name is still unknown) who had falsely represented himself to be Jose Castro. Thereafter, an administrative law judge, following an evidentiary hearing, found that Hoffman had engaged in unfair labor practices including the discriminatory selection of union adherents in the layoffs which included the illegal alien known as Castro.

After the disclosure of the undocumented worker's illegal status and his fraudulent use of the birth certificate, the administrative law judge unsurprisingly recommended neither reinstatement nor backpay. I find this decision by the administrative law judge unsurprising for multiple reasons. First, as it would be unlawful for Hoffman to employ the illegal and pay him earned wages, it defies logic-indeed it boggles the mind-to suppose that the employer could be compelled by law to pay to the illegal unearned wages which he could not lawfully earn and to which he would have no claim but for his prior successful fraud. If this were a case of first impression I would find it simple. I would hold that by no theory of law or equity could the federal government compel an employer to employ an illegal alien to do nothing and pay him for doing nothing when it could not lawfully employ him to work and pay him for working. But this is not a case of first impression. There is controlling Supreme Court law which makes the case an even easier one.

Analysis

In *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court reviewed a Seventh Circuit decision which had modified an NLRB order applying the National Labor Relations Act to unfair labor practices committed against

undocumented aliens. *See NLRB v. Sure-Tan Inc.*, 672 F.2d 592 (7th Cir. 1982). The High Court concluded that the Circuit was correct in upholding the Board's position "that undocumented aliens are 'employees' within the meaning of [29 U.S.C. § 152(3)]." 467 U.S. at 891. The Court reached this conclusion based on the deference owed the Board in "defining the term 'employee,'" a task "that 'has been assigned primarily to the agency created by Congress to administer the Act.'" Id. at 891 (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)); *cf Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). That said, the Supreme Court nonetheless vacated the remedial portion of the Seventh Circuit decision, which had ordered the Board to award an irreducible minimum of six months backpay to each of the affected employees even in the face of the employees' illegal entry and presence in the United States. In vacating that portion of the Seventh Circuit decision, the Supreme Court held, "[b]y directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or *legal availability for work*, The Court of Appeals plainly exceeded its limited authority under the Act." *Sure-Tan*, 467 U.S. at 90405 (emphasis added). Based on that italicized phrase, even if this were all the Supreme Court had held on the question, I would nonetheless conclude that *Sure-Tan* compels us to vacate the Board's decision overruling the logical result reached by the administrative law judge. But the Supreme Court did not stop there.

The Supreme Court explicitly rejected the position taken by the NLRB and the majority in today's decision when it held, "[s]imilarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Id*, at 903. It is difficult to see how the Court could more clearly have decided the question oppositely to the Board's resolution in the decision we now review.

Read in context, the sentence speaks even more plainly:

> Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally important Congressional objective-to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. *Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.*

Sure-Tan, 467 U.S. at 902-03 (emphasis added) (internal quotation marks and citation omitted). In a feat of *ipse dixit*, the logic of which escapes me, the majority today declares that this paragraph demonstrates that the Supreme Court's holding in the final sentence has nothing to do with the issues before us. The Supreme Court in a rather concise paragraph makes it plain that it is dealing with the possibility of affording a backpay remedy to illegal aliens. It further makes it plain that such a remedy is not an option when the employees are "deemed unavailable" for work and that such a period of. deemed unavailability occurs "during any period when they were not lawfully entitled to be present and employed in the United States." The majority refuses to apply this rather simple statement of law that a lack of legal presence in the country constitutes unavailability for employment to the anonymous person known as Castro. The majority reaches this conclusion by creating a dichotomy-never mentioned by the Supreme Court-between illegal aliens who have departed the United States without legally re-entering and those like the illegal alien known as

Castro who may or may not have interrupted the continuity of their illegal stay in the country. *See* Maj. Op. at 14-15. Having created the dichotomy heretofore unrecognized by the Supreme Court, the majority then refuses to apply the sentence by its terms to persons in the newly minted subcategory, apparently because the Supreme Court did not separate out the subcategory and reaffirm the applicability of the stated principle to it. The majority does not recognize that neither does the Court ever suggest that application is limited to employees whose legal unavailability arises from an interrupted period of illegal presence as opposed to a continuous one.

The majority accuses me of taking a sentence out of context from the Supreme Court's decision. For its proposition that the quoted sentence is not applicable, the majority expends several pages of type and suggests ways of supplying emphases not present in the opinion to get around the apparent meaning of the Supreme Court's language that employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." Read in context, read out of context, or read both ways and compared, the majority is left with no way of dealing with the High Court's plain statement. I invite the reader to review the phrase "not lawfully entitled to be present and employed" in its original context. I further suggest that contextual illumination for this sentence of the High Court's opinion is supplied in the Court's analysis of the Seventh Circuit decision that it was reversing. The High Court described that decision as "[r]ecognizing that the discharged employees would most likely not have been lawfully available for employment and so would *receive no backpay award at all ....*" *Sure-Tan*, 467 U.S. at 890 (emphasis added). Thus, the governing factor in determining eligibility for backpay awards is not mere presence, but also the lawful entitlement to be present.

The majority fundamentally errs in rewriting the phrase "not lawfully entitled to be present and employed in the United States" so that it has no application to a case like the present one in which an alien fits precisely within the situation described by that phrase: *i.e.*, an alien who is present in the United States but without legal permission to be present and without a legal right to be employed here. In effect, that view rewrites the phrase to read "not present, and not lawfully entitled to be present in the United States." It adds the "not present" limitation and deletes the "not lawfully entitled to be ... employed" requirement. That rewriting of *Sure-Tan* leads the majority astray.

The rewriting of *Sure-Tan* endorsed by the majority appears to have first occurred in *Bevles Co. v. Teamsters Local* 986, 791 F.2d 1391, 1393 (9th Cir. 1986). Before that time, even its critics believed that *Sure-Tan* meant what it said. *See Sure-Tan*, 467 U.S. at 911 (Brennan, J., dissenting) (criticizing the majority for holding that undocumented aliens "are effectively deprived of any remedy"); *Felbro, Inc.*, 274 N.L.R.B. 1268, 1269 (1985) (stating that the undocumented aliens in *Felbro*, who had remained in the country, would be affected by *Sure-Tan); Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986) *("Felbro")* (Beezer, J., dissenting in part); Terry A. Bethel, *Recent Labor Law Decisions of the Supreme Court*, 45 Md. L. Rev. 179, 196 (1986) *("Sure-Tan* . . . deprive[s] undocumented employees of any effective remedy for unlawful discrimination . . ."); Lucinda M. Cardinal, Note, *Immigrqtion Reform. Solving the "Problem" of the Illegal Alien in the American Workforce*, 7 Cardozo L. Rev. 223, 244 (1985) *("Sure-Tan* mandates that illegal aliens do not receive the remedies granted their legal coworkers."); John W. Sagaser, Note, *Rights Without A Relations-Illegal Aliens Under the National Labor Relations Act*, 27 B.C.L. Rev. 407, 452 (1986) ("By denying a minimum backpay award, the Court in effect deprives illegal alien workers of any remedy."). In *Bevles*, the court was reviewing an arbitrator's award; the issue was whether the arbitrator's decision showed a

"manifest disregard of the law," and the court was not entitled to reverse erroneous legal conclusions. *See* 791 F.2d at 1392-93 & n.2. In not following *Sure-Tan*, the court ignored the lawful presence requirement and considered whether the aliens in that case were lawfully entitled to be employed. The court clearly relied on the fact that-piior to the passage of IRCA-it was not a criminal act for employers to hire undocumented aliens. *See id.* at 1393. The court also considered the effect of section 2805 of the California Labor Code, which prohibited employers from knowingly employing undocumented aliens if it would affect lawful workers. Because an unreversed state court decision had previously held section 2805 unconstitutional, the court did not fault the arbitrator for disregarding it. *See id.* at 1393-94.

The focus on the lawful right to seek employment continued in *Felbro*. The Ninth Circuit there again relied on the fact that it was not illegal for an employer to hire undocumented aliens. Because the *Sure-Tan* employees could not lawfully reenter the United States, the court noted that they were "unavailable for work during the backpay period." *Felbro*, 795 F.2d at 719. The court reasoned that being present in the United States did not create unavailability because "[t]here is no provision 'in the INA making it unlawful for an employer to hire an alien who is present or working in th6 United States without appropriate authorization.'" *Id.* (quoting *Sure-Tan* 467 U.S. at 892-93).

Since the passage of IRCA, both the Second and Ninth Circuits have registered concern over IRCA's effect on their misguided attempts to limit *Sure-Tan*. In *Rios v. Enterprise Assn Steamfitters Local Union 638*, 860 F.2d 1168 (2d Cir. 1988), the Second Circuit was careful to explain that recovery was only permissible because the claimants were "available for employment during the entire period covered by the backpay order, since such employment would have violated no immigration law." *Id.* at 1173. The court explicitly reserved the question of whether IRCA would affect later claims. *See id.* at 1172 n.2. The Ninth Circuit likewise has

questioned the viability of its *Felbro* decision after IRCA. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517-18 n.11 (9th Cir. 1989). In a further Second Circuit case postdating the enactment of IRCA, that circuit continued to follow its pre-enactment precedent. *See NLRB v. AP.R.A Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997). However, as Judge Jacobs clearly demonstrated on dissent, without the slender reed of the employer's legal capacity to hire undocumented aliens, "an undocumented alien is not' lawfully available for employment."' *Id.* at 62 (Jacobs, J., dissenting) (quoting *Sure-Tan*, emphasis supplied by Judge Jacobs). As Judge Jacobs pointed out, the remedy of backpay to the alien ineligible for employment "is foreclosed by *Sure-Tan* and IRCA *Id.*

Like the Second Circuit in *AP.R.A Fuel*, the majority today offers nothing that should lead us to believe that the Supreme Court in *Sure-Tan* meant anything other than what it said; and what it said disqualifies the illegal alien in this case from an award of backpay.

Conclusion

For the reasons set forth above, I would grant Hoffman Plastic's petition for review of the Board's order, and deny the cross-petition for employment. I respectfully dissent.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary. National Labor Relations Board. Washington. D.C. 20570. of any typographical or other formal errors so that corrections can he included in the bound volumes.

Hoffman Plastic Compounds, Inc. *and* Casimiro Arauz.
Case 21-CA-26630

September 23, 1998

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 12, 1993, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

The issue presented in this case is the effect of the status of discriminatee Jose Castro as an undocumented worker on the extent of the make-whole remedies available to him. In *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), affd. 134 F.3d 50 (2d Cir. 1997), the Board concluded that the most effective way to accommodate and further the immigration policies embodied in the Immigration Reform and Control Act of 1986[2] is to provide the protections and remedies of the

[2] 8 U.S.C. § 1324a et seq.

National Labor Relations Act (NLRA) to undocumented workers in the same manner as to other employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals. Applying that principle to the facts of this case, we find that discriminatee Jose Castro is entitled to limited backpay, as provided below.

I. BACKGROUND

A. The Respondent Unlawfully Laid Off Jose Castro

On January 31, 1989, the Respondent laid off Jose Castro, Moises Gonzalez, and several other employees. The Board thereafter found that the Respondent had unlawfully laid off Castro, Gonzalez, and other employees. The Board ordered the Respondent, inter alia, to offer these individuals reinstatement to their former positions and to make them whole for any losses they may have suffered because of the unlawful layoffs. Hoffman Plastic Compounds, 306 NLRB 100 (1992). A controversy thereafter arose over compliance with the terms of the Board's Order, and the Board accordingly conducted a compliance proceeding.[3]

B. The Board's Compliance Proceeding

On June 14, 1993, Castro testified at the Board's compliance proceeding that he is not a citizen of the United States. The Respondent's counsel thereafter posed the following question to Castro: "What kind of documents do you have that authorize you to work in the United States?" The judge sustained the General Counsel's objection to that question. The judge nevertheless permitted the Respondent's

[3] On July 29, 1994. the Board issued a Supplemental Decision and Order adopting the judge's recommended Order in the compliance proceeding with respect to discriminatee Moises Gonzalez. *Hoffman Plastic Compounds*, 314 NLRB 683 (1994). The Board further ordered that the portion of the judge's supplemental decision relating to discriminatee Jose Castro be severed and subject to further consideration.

counsel to further question Castro, by way of an offer of proof, as to whether he was authorized to work legally in the United States. Castro responded that he works in the U.S. based on a birth certificate that is not his own. Castro stated that he was born in Mexico, while the birth certificate is for an individual born in El Paso, Texas. Castro testified that "[t]he birth certificate was loaned to me so that I can secure a job because I have no work." Castro additionally testified that he presented this birth certificate to the Respondent in order to obtain employment.

It was further disclosed at the compliance proceeding that the Respondent sent Castro a recall letter by certified mail on March 10, 1989. The letter stated:

> Please contact [Plant Manager] Robert Wilkerson as to your availability for work no later than 4:00 P.M., Monday, March 13, 1989.
>
> It looks like we'll need a few men soon.

The letter was sent to the home of Castro's niece, a location which he used as his mailing address. Castro did not respond to the letter. He testified that he never received the letter and that his niece never told him about it.

The judge, who issued his supplemental decision in this case before the Board issued its decision in *A.P.R.A. Fuel*, supra, concluded that Castro was not entitled to either reinstatement or backpay. The judge reached this decision in light of his reading of *Sure Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and his findings that Castro lacked legal authorization to work in the United States at any time and that it would be unlawful under the Immigration Reform and Control Act of 1986 (IRCA), for the Respondent to employ him without such authorization. The judge also relied on his finding that Castro had gained employment with the Respondent by proffering fraudulent documentation and that it had not been shown that he had applied for authorization to work in this country.

In light of the judge's finding that Castro was ineligible for reinstatement and backpay, the judge found it unnecessary to determine whether the Respondent satisfied its obligation to offer reinstatement to Castro and thereby tolled its remedial obligation. We commence our analysis by addressing this question.

II. DISCUSSION

A. The Respondent Did Not Make a Valid Offer of Reinstatement to Castro

It is well established that an offer of employment must be specific, unequivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation.[4] We cannot conclude that the Respondent's letter dated March 10, 1989, offering reinstatement to Castro satisfied these requirements. The Respondent's offer letter, which we have set forth above, does not designate a specific job or even a job classification. Further, the Respondent's letter does not unequivocally make an express offer of a job to Castro, but rather vaguely provides that "it looks like we'll need a few men soon." In these circumstances, we must find that the Respondent's offer of reinstatement was neither specific nor unequivocal, and we accordingly conclude that the Respondent did not make a valid offer of reinstatement to Castro in its letter of March 10, 1989. *Holo-Krome Co.*, supra at 454.

In the absence of a valid offer, the Respondent's remedial obligation to reinstate Castro remains, and backpay has not been tolled. The Respondent argues and the judge found, however, that the Respondent's remedial obligation has been extinguished in light of Castro's immigration status

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[4] *See, e.g., Hoffman Plastic Compounds*, supra at 683; *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992).

as adduced at the compliance proceeding. We accordingly turn to consideration of this issue.

B. Remedial Obligations Under the NLRA in Light of U.S. Immigration Law

In *A.P.R.A. Fuel*, supra at 408, the Board considered the effect of discriminatees' alleged status as undocumented workers on the extent of the make-whole remedies available to them in light of the enactment of IRCA, which, for the first time, established sanctions for employer conduct, prohibiting employers from knowingly hiring or continuing to employ undocumented aliens.[5] That statute lists categories of documents that may be used to establish an employee's identity and eligibility to work. In order to meet its IRCA obligations, an employer must examine the documents presented by a newly hired employee to establish his identity and work eligibility and must attest that it has done so and that the documents appear to be genuine and relate to that employee.[6] Further investigation of the matter is warranted only when an employer has reason to know that an applicant is not authorized to work for it.[7]

In *A.P.R.A. Fuel*, after reviewing the objectives of IRCA and the National Labor Relations Act, the Board concluded, for the reasons there set forth, that the most appropriate way to harmonize the statutes was to apply the following rules to make-whole relief for employees who have been discharged for reasons unlawful under the Act and who had not previously provided valid documents establishing that they may lawfully work in the United States. The Board held that, in such a case, it would issue an order requiring reinstatement

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[5] 8 U.S.C. § 1324a(a).

[6] 8 U.S.C. § 1324a(b).

[7] See *Collins Food International, Inc. v. U.S. Immigration & Naturalization Service*, 948 F.2d 549, 553-555 (9th Cir. 1991); and *Mester Mfg. Co. v. INS.*, 879 F.2d 561, 566-567 (9th Cir. 1989).

and backpay, but the respondent employer's obligation to reinstate would be conditioned on the discriminatees' production, within a reasonable time, of documents enabling the respondent to meet its obligation under IRCA to verify the discriminatees' eligibility for employment in the United States. *Id.* at 415. The Board further held that backpay should be tolled either as of the date the discriminatees are reinstated subject to compliance with the respondent employer's obligations under IRCA or when, after a reasonable period of time, they fail to produce the documents required by IRCA.[8]

In *A.P.R.A. Fuel*, the Board stated in dictum that it would extend its after-acquired knowledge rule to discharge cases concerning undocumented workers. Under this rule, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct."[9] The employer in *A.P.R.A. Fuel*, however, had known, when it hired the employees it later unlawfully discharged, that they were not legally entitled to work in the United States. Therefore, it was precluded from asserting that it would have terminated the discriminatees on the basis of their immigration status.

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[8] The Board noted that its reasons for concluding that this remedy represented an appropriate accommodation of the purposes of the Act with the purposes of IRCA reflected the rationale in the Ninth Circuit's opinion in *Garment Workers Local 512 (Felbro) v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

[9] 320 NLRB at 416 fn. 44, citing *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994), and *John Cuneo, Inc.*, 298 NLRB 856, 856-857 (1990).

C. The Remedial Obligation Owed to Discriminatee Jose Castro

The Respondent contends that Castro is not entitled to reinstatement and backpay because he disclosed at the compliance proceeding that at no time has he been lawfully authorized to work in the United States.[10] It contends that the Supreme Court's decision in *Sure-Tan* and the later enactment of IRCA preclude any such remedy. The Respondent's arguments in this regard are virtually identical to the arguments that the Board rejected in *A.P.R.A. Fuel*, and we adhere to that precedent.

However, we find merit in the Respondent's defense based on the after-acquired knowledge rule referred to in *A.P.R.A. Fuel*, as noted above. Specifically, the record supports the Respondent's contention that it would not have offered Castro initial employment had it known of his unauthorized immigration status. In this connection, the record shows, and the judge found, that the Respondent attempted to comply with IRCA when it hired Castro, and that the Respondent did not learn until the back-pay hearing that Castro used fraudulent identification in applying for employment. In this respect, the instant case is distinguishable from *A.P.R.A. Fuel*, in which the employer was on notice from the outset of the employees' ineligibility for employment and was therefore precluded from raising an

[10] As set forth in sec. I,B, supra, this information was elicited in a series of questions to which counsel for the General Counsel objected at the outset. The judge indicated he agreed with that objection, but then permitted the Respondent's counsel to ask the questions as part of an 'offer of proof." At the end of the questioning, the judge stated he was sustaining the objection. Nonetheless, in his written decision, he made factual findings based on Castro's admission. No exception has been filed to the receipt of that evidence into the record or to the judge's factual finding that Castro obtained employment by using a fraudulent birth certificate. Therefore there is no issue before us as to whether the judge should have barred the Respondent from questioning Castro about his eligibility for employment.

after-acquired knowledge defense. In addition, the record shows that the Respondent's policy of compliance with IRCA is evidenced in its employment application, which poses the following question to applicants: "Are you prevented from lawfully becoming employed in this country because of Visa or Immigration Status?"[11] Finally, there is no evidence that the Respondent knowingly hired any employee in violation of IRCA. Accordingly, under *Marshall Durbin*, supra, and *John Cuneo*, supra, Castro is not entitled to reinstatement, and backpay shall terminate on June 14, 1993, the date that the Respondent learned that Castro used fraudulent identification to gain employment.

ORDER

The National Labor Relations Board orders that the Respondent, Hoffman Plastic Compounds, Inc., Paramount, California, its officers, agents, successors, and assigns, shall

(a) Pay to Jose Castro backpay in the amount set forth opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), less tax withholdings required by Federal and state laws, as required by the Board's Order of January 22, 1992:

Jose Castro $66,951[12]

[11] In his exceptions, the General Counsel points Out that Castro answered this question on his application in the affirmative and argues that the Respondent was therefore aware of Castro's unauthorized immigration status at the time it hired him. We find no merit in this contention, because the record clearly shows that the Respondent only hired Castro after he had supplied, as the Respondent required, documents that appeared to be genuine and relate to the person presenting them.

[12] The amount we have ordered to be paid to Castro, with interest, is that set forth in the March 4, 1993 second amended compliance specification, computing backpay due to Castro through the last quarter of 1992. We note that the Respondent in its answer and first amended answer to the compliance specification and first amended compliance

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. September 23, 1998

Sarah M. Fox, Member

specification did not dispute the General Counsel's method of calculation of backpay benefits owed to Castro. At the compliance hearing held on March 4, 1993, however, the Respondent's counsel "dispute[d] the backpay calculations and the backpay periods specified in the second amendment to the compliance specification." We find, based on our review of the record, that the General Counsel's method of calculation of backpay owed to Castro is valid and reasonable. *See Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1290 (10th Cir. 1982). Thus, the General Counsel computed gross backpay by multiplying Castro's hourly rate of pay by the average hours per week and overtime that Castro would have worked during the backpay period in light of his previous work schedule, and factored in wage rate increases based on those received by an employee, Carlos Montalvo, who worked in Castro's job classification during the back-pay period.

We additionally have considered and rejected the Respondent's argument that Castro is not entitled to backpay because he cannot, according to the Respondent, make reasonable efforts to find interim work in light of his undocumented status. The record shows that Castro worked as a carpenter's helper, gardener, day laborer, and mechanic's assistant following his unlawful layoff, and in addition unsuccessfully applied for work at certain factories. Thus, we find that Castro satisfied his obligation to make reasonable efforts to find interim work following his unlawful layoff by the Respondent.

As set forth above, we have ordered payment of backpay due Castro through the last quarter of 1992. The backpay specification, as amended, alleges that the Respondent's backpay liability owed to Castro is continuing since he has not been tendered a valid offer of reinstatement. However, we have found, supra, that Castro is not entitled to an offer of reinstatement and that the backpay period terminates on June 14, 1993. Therefore, the only remaining backpay due Castro is for the period of January 1 through June 14, 1993.

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HURTGEN, dissenting.

My colleagues award backpay (albeit tolled) to discrimtnatee Castro. I would not do so.

In *Sure-Tan, Inc. v. NLRB*, the Supreme Court declared that backpay was inappropriate "during any period when [employees] were not lawfully entitled to be present and employed in the United States."[1] In addition, since *Sure-Tan*, Congress passed the Immigration Reform and Control Act of 1986 (IRCA) which made it unlawful for an employer to employ persons who lack appropriate authorization to work in the U.S.

I now apply these principles to the instant case. The case involves an employee who is not lawfully entitled to work in the U.S., and it would be unlawful for the Respondent to employ him. For these reasons, and those set forth in the dissent in *A.P.R.A. Fuel Oil Buyers Group*,[2] I would not award backpay to Castro.

Dated, Washington, D.C. September 23, 1998

Peter J. Hurtgen, Member

NATIONAL LABOR RELATIONS BOARD

Peter Tovar, Esq., for the General Counsel..
Ryan McCortney, Esq. (Sheppard, Midlin, Richter & Hampton), of Los Angeles, California, for the Respondent.

[1] 467 U.S. 883, 903 (1984).

[2] 2320 NLRB 408, 419 (1995).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on March 4 and 5 and June 14, 1993. On January 22, 1992, the Board issued its Decision and Order (306 NLRB 100) finding that the Respondent, Hoffman Plastic Compounds, Inc., had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board ordered, inter alia, that the Respondent offer Casimiro Arauz, Jose Castro, and Moises Gonzalez full reinstatement to their former positions and that the Respondent make whole Mauricio Mejia, Arauz, Castro, and Gonzalez for any loss of earnings they may have suffered because of their unlawful layoffs. On April 10, 1992, the Respondent and General Counsel entered into a stipulation whereby the Respondent waived its right under Section 10(e) and (f) of the Act to contest the propriety of the Board's Order issued on January 22, 1992, or the findings of fact and conclusions of law underlying that Order. A controversy having arisen over the amount of backpay due and the terms of the Board's Order, on September 30, 1992, the Regional Director for Region 21 of the Board issued a compliance specification and notice of hearing. On October 4, 1993, the Respondent and the General Counsel reached agreement on the backpay for Mejia and that settlement has been satisfied. On October 27, 1993, the Respondent and Arauz reached settlement on Arauz' claims. Counsel for the General Counsel approved the settlements on October 29, 1993. I approved the settlement on November 3, 1993, and issued an order granting the parties' joint motion to withdraw the allegations of the compliance specification concerning Arauz and Mejia.

The issues remaining for decision are (1) whether the Respondent made valid offers of reinstatement to Castro and Gonzalez in March 1989; (2) whether Gonzalez voluntarily quit his employment in March 1989; and (3) whether the Respondent should be ordered to offer Castro, an

undocumented worker, reinstatement to his former job. After resolution of these principal issues, there remains the computation of backpay and the resolution of some subsidiary issues necessary thereto.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties,[1] I make the following

Findings and Conclusions

In the underlying case, on January 31, 1989, the Respondent laid off nine employees. The Board found that the layoff was for economic reasons and would have occurred regardless of the union organizing activities. However, the Board agreed with Administrative Law Judge Gordan J. Myatt that the Respondent in order to rid itself of known union supporters, discriminatorily selected union adherents for layoff The Board and the judge found that Maurico Mejia was recalled in March 1989 and found it unnecessary to order reinstatement.

Although the record indicated that the Respondent sent recall letters to Casimiro Arauz, Moises, Gonzalez, and Jose Castro, the effect of the recall letters was left to the compliance stage of the proceeding.

On March 10, 1989 the Respondent sent recall letters to the laid off employees including the two discriminatees at issue, Castro and Gonzalez. The letters stated:

> Please contact Robert Wilkerson as to your availability for work no later than 4:00 P.M., Monday, March 13, 1989.
>
> It looks like we'll need a few men soon.

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[1] Briefs were filed by the Respondent and General Counsel on November 1, 1993.

Moises Gonzalez testified that he met with Wilkerson on March 13 with his supervisor Ramon Rosas acting as interpreter. According to Gonzalez he was told he could come back to work if he dropped his claim (the instant charge) against the Respondent. Gonzalez agreed to begin working on the graveyard shift that evening. Gonzalez did not show up for work. He testified that his daughter was ill and that he had to take her to the hospital.[2] Gonzalez testified that on Monday, Wilkerson called him and said that the owner did not want Gonzalez and that there was no job for him.

Wilkerson testified that he offered Gonzalez work on the graveyard shift and that Gonzalez accepted the offer. Gonzalez was scheduled to work that Saturday and Sunday evenings. According to Wilkerson, Gonzalez did not show up for work or call in. On the following Monday, after Gonzalez did not call in, Wilkerson discharged Gonzalez for abandoning his job. Wilkerson denied ever telling Gonzalez not to come to work. Wilkerson had a position open for Gonzalez. Both Wilkerson and Rosas denied that there was any mention of dropping the claim or charge. I credit their denials. First, Gonzalez made no mention of this condition on the recall to work in his 1990 testimony. Second, Wilkerson's testimony was corroborated by his notes and business records. Third Wilkerson's testimony was corroborated by that given by Rosas. I found Rosas to be a very credible witness. Thus I credit Wilkerson's and Rosas' testimony over that of Gonzalez.

Rosas testified that Gonzalez came and asked for work and that the two of them went to speak with Wilkerson. Wilkerson told Gonzalez that he could work on the graveyard shift and Gonzalez agreed to work that evening. Gonzalez did not show up for work on either Saturday or Sunday evening. Rosas reported these facts to Wilkerson on Monday morning.

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[2] In the underlying case, Gonzalez testified that he took his son to the hospital.

Rosas further testified that shortly thereafter he saw Gonzalez and asked what had happened. Gonzalez answered that he had "messed up."

I find that backpay for Gonzalez was terminated as of March 13,1989, when he failed to return to work. The credible testimony of Rosas and Wilkerson shows that Gonzalez, after agreeing to work, did not show up for work or call in to explain his absences. After 3 days, Wilkerson could, in accordance with his past practice as to consecutive absences, lawfully assume that Gonzalez had abandoned his employment. The fact that the Respondent was presented with the opportunity to terminate its backpay liability and/or the opportunity to discharge Gonzalez is of no legal consequence. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); and *P.G. Berland Paint City, Inc.*, 199 NLRB 927, 927-928 (1972).

The General Counsel argues that Gonzalez was not fully reinstated and, therefore, could turn down this job. I find no evidence to support that allegation. The evidence indicates that Gonzalez was offered the same job he had before the layoffs and that he told Rosas that he was "happy" with the offer. Although no mention was made to Gonzalez that he would return to work without prejudice to his seniority, the failure to do so does not invalidate the offer and acceptance. *National Screen Products Co.*, 147 NLRB 746, 747 (1964).

Gonzalez would have been discharged for this conduct regardless of the prior union activity. The Respondent treated the unexplained failure to report for work as grounds for immediate termination. The evidence shows that the Respondent would have discharged any employee based on the unexplained failure to report to work for 3 days. No other employees known to have engaged in similar conduct were retained. Animal Humane Society 287 NLRB 50 (1987).

The compliance specification, as amended, assumes that Gonzalez would have received raises every 6 months. However, I find that his backpay period terminated prior to the time he would have received a raise.

The record reveals that Castro was sent a recall letter on March 10, 1989. The letter was sent by certified mail to the address he had given the employer and was signed for by his niece. Castro has used his niece's home as his mailing address for many years and continues to do so. Castro did not respond to the letter. He testified that he never received the letter and that his niece never told him about the letter.

According to Castro, 2 years after his discharge he returned to the Respondent's plant and asked for work. Castro testified that Wilkerson turned him down because he did not speak English. Wilkerson credibly denied this incident. Wilkerson testified that he never saw or spoke with Castro after the layoff of January 1989. According to Wilkerson, one half of the employees do not speak English. He hired Castro in 1988 even though the employee spoke no English.

The Respondent discovered at the backpay hearing that Castro used fraudulent identification in applying for work with the Respondent. Castro used a fraudulent birth certificate as identification for immigration purposes.[3] Castro testified that he used a friend's birth certificate and that he uses that certificate to work in the United States. Castro also had a California driver's license and a social security card evidently obtained by use of the fraudulent birth certificate. He testified that he uses the false identification in order to work in this country. Castro is not authorized to work in this country. The Respondent contends that since it did not know that Castro was not authorized to work it cannot be now ordered to employ him in contradiction of the immigration laws.

In *Sure-Tan, Inc. v. NLRB*, 467 US 883 (1984) the Supreme Court held that undocumented workers are employees within the meaning of the Act. However, discriminatees will be deemed unavailable for work during any period in which they are not lawfully entitled to be

[3] Castro was born in Mexico and the birth certificate is for someone born in El Paso, Texas.

present and employed in the United States. Backpay is, therefore, tolled during any period when a discriminatee is not lawfully authorized to work in this country. Subsequent to *Sure-Tan* Congress passed the Immigration Reform and Control Act of 1986 (IRCA) making the employment of unauthorized aliens unlawful and imposing sanctions on employers who knowingly hire them.

In the instant case, Castro was hired subsequent to the effective date of IRCA (November 6, 1986) by using false identification. The record shows that the Respondent attempted to comply with IRCA. Castro admitted that at no time was he lawfully entitled to work in this country. Thus, I find that under the Supreme Court's ruling in *Sure-Tan* Castro is not entitled to backpay as of the date of the hearing. However, as noted above, the Respondent has not yet offered reinstatement to Castro. The issue is whether the Respondent should be ordered to reinstate Castro conditioned on his obtaining lawful authorization to work in this country.

The Respondent argues that it attempted to comply with IRCA and only hired Castro based on the false information and identification supplied to it. Thus, the Respondent contends that it never would have hired Castro had the facts been known and that Castro should not be entitled to any remedy.

In Fiber Glass Systems, 298 NLRB 504, 506 (1990), the Board followed the Circuit Court of Appeals for the Fifth Circuit and ruled that the employer could show in the compliance stage of the proceedings that the discriminatee never would have been hired. However, the Board indicated that it was following the court's remand as the law of the case and was making no determination on the issue.[4] The Board has not since addressed this issue.

[4] See *W. Kelly Gregory*, 207 NLRB 654 (1973); *National Packing Co.*, 147 NLRB 446 (1964); and *Southern Airways*, 124 NLRB 749 (1959).

Since the Respondent did not knowingly hire Castro in violation of IRCA, it appears that the best result would be not to order the Respondent to make an offer of reinstatement. Castro was not lawfully authorized to work in the United States at the time of his hire, his termination, the unfair labor practice hearing, nor the backpay hearing. Castro and the General Counsel had the opportunity to show that Castro was now authorized to work in this country but did not do so. Further, there is no evidence that Castro has made application for authorization to work in this country. The presumption is that Castro will continue to lack authority to work lawfully in this country. Thus, a reinstatement order, even conditioned on Castro obtaining authorization to work in this country, would be putting form over substance. A proper remedy should not order actions that would be futile.

I find the cases cited by the General Counsel to be inapposite. In *A.P.R.A. Fuel Oil Buyers Group*, 309 NLRB 480 (1992), cited by the General Counsel, the Board ordered reinstatement of two employees who were not authorized to work in this country. However, in each instance the employer knew at the time of hire that the employee was not authorized to work and had hired him in violation of IRCA. *In E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit ordered backpay for undocumented workers whose claims arose prior to the effective date of IRCA. In *Del Rey Tortilleria. Inc. v. NLRB.*, 976 F.2d 1115 (7th Cir. 1992), the Seventh Circuit Court of Appeals held that undocumented workers were not entitled to backpay and reinstatement. The workers there had also been hired prior to the effective date of IRCA.

In the instant case, there is nothing to suggest that the Respondent hired any employee in violation of IRCA. With respect to Castro, the employee was required to file an I-9 form and submit proper identification. The fraudulent identification was not apparent and there is nothing to suggest that the Respondent knew of Castro's status until the last day of the hearing. The Respondent raised Castro's status as an

undocumented worker after Castro's admissions at the hearing. Finally, in the above-cited cases the Board left the remedy issues to the compliance stage of the proceedings. Here we are at the compliance stage and Castro is still not authorized to work in the United States. Under these circumstances, I believe the litigation should come to an end and will not order a futile reinstatement remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

SUPPLEMENTAL ORDER

It is ordered that the Respondent, Hoffman Plastic Compounds, Inc., forthwith pay to each of the following persons backpay in the amounts set opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of January 22, 1992:

Jose Castro	$ 0.00
Moises Gonzalez	1638.50

Dated, November 12, 1993

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[5] All motions inconsistent with this recommended supplemental order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1570 September Term, 1999

Hoffman Plastic Compound, Inc.

Petitioner,

v.

National Labor Relations Board,

Respondent.

United States Court of Appeals
For District of Columbia Circuit
Filed
Jun 16 2000
Clerk

BEFORE Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, the response thereto, and the vote by a majority of the judges of the court in regular active service in favor of the petition, it is

ORDERED that the petition be granted. This case will be reheard by the court sitting en banc. It is

FURTHER ORDERED that the judgment filed herein on March 17, 2000 is hereby vacated.

An order governing further proceedings will issue at a later date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/

Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

8 U.S.C. § 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29) to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

. . . .

(e) Compliance

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred.

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity—

(i) to comply with the requirements of subsection (b) (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require

the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

. . . .

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations.

Whether the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

8 U.S.C. § 1324c. Penalties for documents fraud

(a) Activities Prohibited

It is unlawful for any person or entity knowingly—

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter,

(4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title or obtaining a benefit under this chapter, or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this chapter, or any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

§ 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa permit, or other document required for entry into the United States or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name

without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facility[1] such an act of international terrorism or a drug crime), or 15 years (in the ease of any other offense), or both.

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title imprisoned not more than 5 years, or both.

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[1] So in original. Probably should be "facilitate"

This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(June 25, 1948, c. 645, 62 Stat. 771; June 27, 1952, c. 477, Title IV, § 402(a), 66 Stat. 275; Oct. 18, 1976, Pub.L. 94-550, § 5, 90 Stat. 2535; Nov. 6, 1986, Pub.L. 99-603, Title I, § 103(a), 100 Stat. 3380; Oct. 24, 1988, Pub.L. 100-525, Title I, § 2(c), 102 Stat. 2610; Nov. 29, 1990, Pub.L. 101-647, Title XXXV, § 3550, 104 Stat. 4926; Sept. 13, 1994, Pub.L. 103-322, Title XIII, § 130009(a)(4), (5), Title XXXIII, § 330011(p), 108 Stat. 2030, 2145; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title II, §§ 211(a)(2), 214, 110 Stat. 3009-569; 3009-572; Oct. 11. 1996, Pub.L. 104-294, Title VI, § 607(m), 110 Stat. 3512.)

Supreme Court, U.S.
FILED
JUN 18 2001
CLERK

No. 00-1595

In the Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Petitioner discriminatorily selected an employee for layoff because he engaged in union-organizing activity protected by the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* The National Labor Relations Board (Board) found that petitioner violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), in laying off that employee. Petitioner subsequently learned that the laid-off employee was an undocumented alien not authorized to be employed in the United States. The Board ordered petitioner to pay back pay to the employee, but only up to the date on which petitioner learned that the employee had used fraudulent identification documents to secure his employment with petitioner. The question presented is whether the Board's order awarding back pay to the employee up to that date is a proper exercise of the Board's remedial authority.

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In the Supreme Court of the United States

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HOFFMAN PLASTIC COMPOUND, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-36a) is reported at 237 F.3d 639. The prior opinion of the court of appeals panel (Pet. App. 37a-77a) is reported at 208 F.3d 229. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 78a-87a) and the decision of the administrative law judge (Pet. App. 88a-95a) are reported at 326 N.L.R.B. 1060. Prior decisions and orders of the Board are reported at 314 N.L.R.B. 683 and 306 N.L.R.B. 100.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 16, 2001. The petition for a writ of certiorari was filed on April 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court held, in agreement with the National Labor Relations Board (Board), that an undocumented alien worker is entitled to the protections of the National Labor Relations Act (NLRA or Act) as an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). See 467 U.S. at 891-894. The Court also sustained the Board's conclusion in that case that the employer had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), when it constructively discharged its undocumented alien workers by reporting them to the Immigration and Naturalization Service (INS), which resulted in the employees' arrest and immediate voluntary departure from the United States to Mexico in lieu of deportation. See 467 U.S. at 886-888, 898-906.

As a remedy for the violation in the *Sure-Tan* case, the Board "ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902. The court of appeals, seeking to reconcile the Board's conventional remedies with the policies underlying the Nation's immigration laws, modified the Board's order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement," and, in computing back pay, to deny

back pay to discriminatees "unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *NLRB* v. *Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982), rev'd in part, 467 U.S. 883 (1984); see also 467 U.S. at 889. Because of the likelihood that the discriminatees might not "have been lawfully available for employment in the United States prior to the date of the new offers of reinstatement which will be required" and thus would "receive no backpay," the court of appeals further concluded that it would best effectuate the policies of the Act "to set a minimum amount of backpay which the employer must pay in any event, because it was his discriminatory act which caused these employees to lose their jobs." 672 F.2d at 606. Estimating that the discriminatees would have continued working for the employer for at least six months until the INS would have independently detected their presence in the United States, the court of appeals ordered that each discriminatee receive back pay for that minimum period of time. *Ibid.*; see also 467 U.S. at 890.

This Court held that the court of appeals' "imposition of this minimum [six-month] backpay award * * * constitutes pure speculation and does not comport with the general reparative policies of the NLRA." *Sure-Tan*, 467 U.S. at 901. As this Court explained, the court of appeals had "'estimated' an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS." *Id.* at 902 n.11. This Court agreed with the court of appeals, however, that "the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States." *Id.* at 902-903. That

condition on the discriminatees' remedy, the Court stated, was appropriate to accommodate "the objective of deterring unauthorized immigration" reflected in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 467 U.S. at 903.[1] The Court added (*ibid.*):

> By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

b. Subsequent to *Sure-Tan*, Congress amended the INA by enacting the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In a substantial change from prior law (see note 1, *supra*), IRCA made it unlawful for employers knowingly to hire aliens not authorized to obtain employment in the United States. Congress provided in IRCA that "[i]t is unlawful for a person or other entity—(A) to hire * * * for employment in the United States an alien knowing the alien is an unauthorized alien * * * or (B) to hire for employment in the United States an individual without complying with the requirements of subsection (b)." 8 U.S.C. 1324a(a)(1). "[T]he requirements of subsection (b)"

[1] The Court observed that, under the version of the INA then in effect, "[t]he central concern of the INA [was] with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," and the INA reflected at most "a peripheral concern with employment of illegal entrants." *Sure-Tan*, 467 U.S. at 892 (quoting *De Canas* v. *Bica*, 424 U.S. 351, 359-360 (1976)).

referred to in Section 1324a(a)(1)(B) are set forth in Section 1324a(b), which establishes an "employment verification system" that obligates each employer to examine specified kinds of documents to verify that a person whom it wishes to hire is not an "unauthorized alien." 8 U.S.C. 1324a(b) (1994 & Supp. V 1999). Section 1324a(a)(2) of Title 8, as added by IRCA, further provides that "[i]t is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1) [*i.e.*, Section 1324a(a)(1)], to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." 8 U.S.C. 1324a(a)(2). An employer who violates Section 1324a may be subject to civil and criminal penalties. See 8 U.S.C. 1324a(e)(4) and (5) (civil penalties); 8 U.S.C. 1324a(f)(1) (criminal penalties). Those penalties apply, however, only if the employer has knowingly hired or retained an undocumented alien or has not complied with the employment verification system.

In addition to placing new restrictions on the hiring practices of employers, IRCA also prohibits certain conduct by individuals seeking employment. Under 18 U.S.C. 1546(b), as added by IRCA, it is a criminal offense for a person to use "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] * * * that the document is false, * * * for the purpose of satisfying a requirement of [Section 1324a(b)]." 18 U.S.C. 1546(b)(1) and (2).[2]

[2] Petitioner incorrectly states (Pet. 11) that this criminal provision respecting the misuse of identification documents by employees was part of the INA "[p]rior to IRCA." Rather, that provision was enacted in 1986 as part of IRCA. Petitioner also

c. In *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995), aff'd, 134 F.3d 50 (2d Cir. 1997), the Board fashioned a conditional reinstatement and back pay remedy for application in cases where, contrary to IRCA, the employer hires individuals knowing that they are not authorized to work in the United States, and then subsequently discharges those employees because of their protected union activity, in violation of Section 8(a)(3) of the NLRA. In that situation, the Board has required the employer to pay the discriminatees back pay from the date of their discharge to the date when they are reinstated, "subject to compliance with the [employer's] normal obligations under IRCA" to verify their eligibility for employment in the United States, or when the discriminatees, after a reasonable period of time, fail to produce "the documents enabling the [employer] to meet its obligations under IRCA," whichever date is earlier. 320 N.L.R.B. at 416; see also Pet. App. 83a.

The Board in *A.P.R.A. Fuel* expressly noted, however, that a different remedy would apply in a situation where, unlike the case before it, the employer did *not* know, at the time of hire, that the employee whom it discharged in violation of the NLRA was not authorized to work in the United States under IRCA, but rather, learns of that fact only after the discharge. See 320 N.L.R.B. at 415 n.39, 416 n.44. The Board explained:

> Under established Board law, if an employer satisfies its burden of establishing that the discriminatee

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incorrectly states (Pet. 11) that a separate provision respecting the misuse of identification documents, codified at 8 U.S.C. 1324c(a) (1994 & Supp. V 1999), was enacted in 1986 by IRCA. Rather, that provision was enacted into law by the Immigration Act of 1990, Pub. L. No. 101-649, § 544(a), 104 Stat. 5059-5061.

> engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct.

Id. at 416 n.44 (internal quotation marks and citations omitted). The instant case involves the application of that limited back pay remedy.

2. a. Petitioner produces polyvinyl chloride pellets at a plant in Paramount, California. In May 1988, petitioner hired Jose Castro to work as a compounder in the plant. Pet. App. 40a; *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 101, 104 (1992). Prior to hiring Castro, petitioner, as required by IRCA (see pp. 4-5, *supra*), examined documents tendered by Castro to verify that he was authorized to work in the United States. Those documents appeared to be genuine and related to the person presenting them. Pet. App. 85a & n.11.

Shortly before Christmas 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, began a union-organizing campaign at petitioner's plant. Castro supported the organizing campaign and distributed authorization cards to co-workers. Pet. App. 5a; *Hoffman Plastic Compounds*, 306 N.L.R.B. at 102, 108. On January 31, 1989, petitioner laid off Castro and all the other employees who had engaged in organizing activities. Pet. App. 5a.

b. On January 22, 1992, the Board issued a decision finding that petitioner had unlawfully responded to the union's organizing campaign by discriminatorily selecting Castro and three other employees for layoff "in order to rid itself of known union supporters," contrary to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3).

The Board ordered petitioner to offer reinstatement to Castro and the other discriminatees, and to make them whole for lost earnings. Pet. App. 5a, 79a; *Hoffman Plastic Compounds*, 306 N.L.R.B. at 100, 107. Thereafter, petitioner entered into a stipulation with the Board's General Counsel, whereby petitioner waived its right to seek judicial review of the Board's January 22, 1992, order finding it in violation of the NLRA and ordering make-whole relief. Pet. App. 88a.

c. On March 4, 1993, the Board commenced a compliance hearing before an administrative law judge (ALJ). Pet. App. 88a; see also *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683 (1994). On June 14, 1993, the final day of the hearing, Castro testified that he was born in Mexico and that, in order to obtain employment with petitioner in 1988, he had tendered a birth certificate that "is not his own," but rather, "is for an individual born in El Paso, Texas." Pet. App. 79a-80a. He further testified that "[t]he birth certificate was loaned to me so that I can secure a job." *Ibid.* Based on Castro's testimony, the ALJ, in a decision that predated *A.P.R.A. Fuel*, recommended that Castro be denied reinstatement and awarded no back pay. *Id.* at 94a-95a.

On September 23, 1998, the Board reversed the ALJ's decision in part. Pet. App. 78a-87a. The Board found that petitioner "attempted to comply with IRCA when it hired Castro," that it "would not have offered Castro initial employment had it known of his unauthorized immigration status," and that it "did not learn until the back-pay hearing that Castro used fraudulent identification in applying for employment." *Id.* at 84a. Applying the "after-acquired knowledge rule" adverted to in *A.P.R.A. Fuel* (see pp. 6-7, *supra*), the Board concluded that "Castro is not entitled to reinstatement, and backpay shall terminate on June 14, 1993, the date [petitioner] learned that Castro used fraudulent identification to gain employment." *Id.* at 85a. Board Member Hurtgen, dissenting, would have denied Castro all back pay. *Id.* at 87a.

3. Petitioner filed a petition for review of the Board's order of September 23, 1998. Initially, a panel of the court of appeals denied the petition for review. Pet. App. 7a, 37a-77a. After rehearing the case en banc, the court again denied the petition for review and enforced the Board's order. *Id.* at 1a-36a.

a. The en banc majority noted that, in this case, the Board, applying its after-acquired knowledge rule, had "relieved [petitioner] of its reinstatement obligation altogether and cut off backpay at the moment Castro's status was discovered." Pet. App. 20a. Thus, "the Board had no need to adopt *A.P.R.A. Fuel*'s other remedy—the award of backpay while the discriminatees attempted to obtain documentation." *Ibid.* Accordingly, the majority explained, "the propriety of such an award is not before us." *Ibid.*

The majority rejected petitioner's contention that *Sure-Tan* "plainly prohibits" the Board from awarding any back pay to Castro. Pet. App. 7a. That contention, the court noted, is based on "a single sentence from *Sure-Tan*." *Ibid.*[3] The court concluded, however, that, "[r]ead in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees." *Ibid.* It explained that to construe that sentence as establishing

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[3] The relevant sentence reads: "[I]n computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Sure-Tan*, 467 U.S. at 903.

an absolute bar to back pay "would conflict with the Court's holding [in *Sure-Tan*] that an undocumented discriminatee is entitled to backpay so long as it is appropriately tailored to the discriminatee's actual loss." *Id.* at 8a.

The court also rejected petitioner's alternative contention that, "even if *Sure-Tan* does not bar backpay to undocumented discriminatees, IRCA does." Pet. App. 14a. The court explained that "IRCA neither amends nor repeals the NLRA or any other labor law," and that "IRCA's legislative history * * * shows that Congress did not intend the statute to limit the NLRA even indirectly." *Ibid.* And it rejected petitioner's contention that, even "[a]bsent a statutory bar * * * the Board's backpay award fails to accommodate IRCA's goal of limiting the hiring of undocumented workers." *Id.* at 16a. As the court explained:

> The Board crafted the limited backpay remedy to avoid conflict with IRCA and to implement its understanding of the purposes of both IRCA and the NLRA. According to the Board, the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA's goal), reinforces collective bargaining rights for all workers (the NLRA's goal), and protects wages and working conditions for authorized workers (the goal of both Acts).

Id. at 23a.

Finally, while the court acknowledged that IRCA "makes it unlawful for employers to knowingly hire undocumented aliens," it noted that IRCA does not "explicitly make it unlawful for undocumented aliens to work." Pet. App. 22a. Although "IRCA criminalizes the false use of documents to obtain employment" (*id.* at 20a), and "Castro could have been prosecuted for his fraud" (*id.* at 22a), the court observed that there was "nothing illegal about his actual employment" with petitioner. *Ibid.* Thus, the court majority concluded that, "when the Board ordered limited backpay, it was not compensating Castro for the loss of wages IRCA prohibited him from earning." *Ibid.*

b. Judge Sentelle, joined by Judges Henderson and Randolph, dissented. Pet. App. 24a-36a. Judge Sentelle would have ruled that *Sure-Tan* "definitively answered" the question before the court and would have required vacatur of the Board's back pay award to Castro. *Id.* at 27a. He also believed that the majority "essentially ignore[d]" the "statutory directives of IRCA," and improperly "cho[se] to mediate between [the] statutory 'goals'" of IRCA and the NLRA. *Id.* at 35a. Judge Ginsburg, in a separate dissenting opinion, agreed with Judge Sentelle that *Sure-Tan* "definitively answered the question" before the court, *id.* at 36a, and therefore found it unnecessary "to reach the question whether the Board reasonably reconciled the remedial scheme of the NLRA with the policies embodied in the IRCA," *ibid.*

ARGUMENT

In the lead case of *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 415-416 (1995), aff'd, 134 F.3d 50 (2d Cir. 1997), the National Labor Relations Board fashioned a limited back pay remedy for cases in which an employer, in violation of IRCA, initially hires an undocumented alien employee with knowledge that the employee is not authorized to work in the United States and then, in violation of the NLRA, discriminatorily fires that employee because of his activities in support of a union. In that situation, the Board has concluded

that the employer should be required to pay the discriminatee back pay commencing on the date of his discharge and running until the date on which he is reinstated—"subject to compliance with the [employer's] normal obligations under IRCA" to verify the alien's eligibility for employment in the United States—or until the discriminatee, after a reasonable period of time, fails to produce "the documents enabling the [employer] to meet its obligations under IRCA," whichever date is earlier. *Id.* at 416; see also Pet. App. 83a. The only court of appeals that has addressed the validity of that particular Board remedy has upheld it. See *NLRB* v. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57-58 (2d Cir. 1997).

The validity of the Board's *A.P.R.A. Fuel* remedy was not before the court of appeals in the present case. See Pet. App. 20a. Rather, the court of appeals below addressed a different Board remedy, which is based on the Board's long-established "after-acquired knowledge" rule. That distinct remedy is fashioned for application where the employer discovers after it has fired an employee in violation of the NLRA that the employee was not authorized to work in the United States at the time of hire, but rather, had secured the job using fraudulent identification documents. See *A.P.R.A. Fuel*, 320 N.L.R.B. at 416 n.44; Pet. App. 84a-85a. Applying that after-acquired knowledge rule in this case, the Board fashioned a remedy for the benefit of the discriminatee in this case: he was denied reinstatement outright, and his entitlement to back pay was terminated as of the date petitioner first acquired knowledge of his earlier fraudulent use of identification documents. See *id.* at 20a, 84a-85a. The court of appeals below addressed only the validity of the limited back pay aspect of the Board's remedy in this case, and

it is the only court that has addressed that precise issue. Moreover, the court of appeals correctly upheld the Board's limited back pay remedy. This Court's review is therefore not warranted.

1. a. The propriety of the Board's back pay order in this case is governed by three remedial principles. First, a back pay order is "a means to restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 900 (1984) (quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941)); see also *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). Thus, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.*, 313 U.S. at 197; see *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952).

Second, "[i]n determining appropriate remedial action, the employee's wrongdoing becomes relevant." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (decided under Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*). Consistent with that principle, the Board has long held that, while a full back pay award is ordinarily warranted to remedy a discriminatory discharge, employment-related misconduct by the discriminatee may constitute "counterbalancing considerations" that "strongly weigh in favor of ordering something less than such a full remedy." *East Island Swiss Prods., Inc.*, 220 N.L.R.B. 175, 175 (1975). Thus, if the discriminatee "engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct." *Marshall Durbin*

Poultry Co., 310 N.L.R.B. 68, 70 (1993) (limiting back pay of discriminatee who had engaged in workplace sexual harassment), enforced in relevant part, 39 F.3d 1312 (5th Cir. 1994); cf. *Nashville Banner*, 513 U.S. at 362 (applying similar back pay limitation rule under ADEA).

Third, in devising remedies under the NLRA, the Board "may [not] wholly ignore other and equally important Congressional objectives," for, "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). Thus, in a case involving remedies for the benefit of undocumented alien employees, the Board's order "is obliged to take into account * * * the objective of deterring unauthorized immigration that is embodied in the INA." *Sure-Tan*, 467 U.S. at 903.

b. The limited back pay award fashioned by the Board in the instant case for discriminatee Castro is consistent with the foregoing remedial principles. First, had petitioner not laid off Castro in violation of the NLRA on January 31, 1989 (see Pet. App. 5a), he would have continued working for, and earning wages from, petitioner. By commencing Castro's entitlement to back pay as of the date of his discharge, the back pay award in this case properly places Castro, for a limited period of time, in the economic position he would have occupied, absent petitioner's unlawful conduct. See *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 265 (back pay award proper where "designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act"); cf. *A.P.R.A. Fuel*, 134 F.3d at 58 (Board's back pay remedy in that case properly "compensates [the undocumented discriminatees] for the

economic injury they suffered as a result of the [employer's] unlawful discrimination").

Second, the Board's limited back pay award in this case properly accounts for Castro's own employment-related misconduct. When Castro initially secured employment with petitioner in May 1988, he tendered false identification documents, contrary to IRCA. Pet. App. 84a-85a; 18 U.S.C. 1546(b)(1) and (2). Once petitioner discovered Castro's unauthorized work status on June 14, 1993, it could not have, consistent with IRCA, continued to employ Castro beyond that date (had he not already been laid off in violation of the NLRA). Accordingly, by terminating Castro's entitlement to back pay as of June 14, 1993, the Board properly placed Castro in the position he would have occupied on that date, given his own misconduct.

Third, the limited back pay award fashioned by the Board for Castro appropriately accommodates federal immigration law. IRCA prohibited petitioner from employing Castro after June 14, 1993, when it learned of his unauthorized immigration status—but not before that date, for at the time of his hire, Castro tendered to petitioner documents that on their face established his entitlement to work in the United States. See p. 5, *supra*. By cutting off Castro's entitlement to back pay as of June 14, 1993 (and by refusing to order reinstatement), the Board accounted for the fact that petitioner could not, consistent with IRCA, continue Castro's employment after that date. On the other hand, while IRCA prohibited petitioner from employing Castro once it had knowledge of his undocumented status, nothing in IRCA prohibits petitioner from paying Castro for work that he had previously performed or had been engaged to perform, or prohibits the Board from awarding back pay to an undocumented worker

who has been subjected to an unfair labor practice. And as the court of appeals observed (Pet. App. 14a), the legislative history of IRCA confirms that Congress "did not intend the statute to limit the NLRA even indirectly." The relevant report of the House Judiciary Committee explains that no provision of IRCA should "be used to * * * limit the powers of federal or state labor relations boards * * * to remedy unfair practices committed against undocumented employees for * * * engaging in activities protected by existing law." *Id.* at 15a (quoting H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 58 (1986)). Accordingly, in IRCA Congress left the Board's remedial powers where it found them.

2. Petitioner contends (Pet. 4-7) that the Board's limited award of back pay to Castro is barred by *Sure-Tan*, and that the decision of the court of appeals upholding that award conflicts with *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F.2d 1115 (7th Cir. 1992). The court of appeals' reading of *Sure-Tan*, however, is correct. Moreover, although the lower court's reading of *Sure-Tan* does conflict with the reading given by the Seventh Circuit in *Del Rey Tortilleria*, this case is not an appropriate vehicle for resolution of that disagreement by this Court.

a. Petitioner's contention (Pet. 4-5, 7) that *Sure-Tan* forecloses the Board's remedy in this case is based entirely on the statement in *Sure-Tan* that, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903. Petitioner overlooks, however, the context in which that statement was made. As the court below correctly explained, that

single sentence in *Sure-Tan* does not, and in context does not appear to have been intended to, establish a general rule of law applicable to all cases involving undocumented workers. See also *A.P.R.A. Fuel*, 320 N.L.R.B. at 411-412, 415-416.

Sure-Tan involved undocumented alien employees who were reported by their employer to the INS in retaliation for pro-union activities and who were immediately arrested by INS and granted voluntary departure (rather than deportation) from the United States. There was no evidence in the record whether the employees had returned to the United States, with or without authorization. Whereas the ALJ had declined to order any back pay based on a finding that the deported employees were "physically unavailable for work," the Board, noting the absence of evidence on that point, ruled that the ALJ erred in failing to order "the conventional remedy of reinstatement with backpay," and deferred the issue of the employees' availability for work to a compliance hearing. See *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1187 (1978).

On the NLRB's petition for enforcement, the Seventh Circuit limited in some respects and expanded in other respects the remedy ordered by the Board. The court limited the remedy of reinstatement to aliens who could show that they were present and lawfully authorized to be in the United States. 672 F.2d at 606. The court further stated that "in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Ibid.* The court noted, however, that "[i]n the circumstances of this case it may well be that the discriminatees will not have been lawfully available for employment in the United States prior to the date of the new offers of

reinstatement which will be required," and that "[i]n that event the discriminatees will receive no backpay." *Ibid.* Concluding that that result was inconsistent with remedial principles of the NLRA, the court ordered the Board to fix a minimum award of six months' back pay for the discriminatees, which the court estimated to be the period in which the employees would have escaped detection from the INS. *Ibid.*

This Court reversed the minimum award of six months' back pay that the court of appeals had ordered, on the ground that such an award would not be "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." 467 U.S. at 901. The Court did not accept the employer's argument (see 82-945 Pet. Br. 19-23) that, as a matter of law, *any* back pay award for the benefit of the discriminatees would be contrary to federal immigration law. The Court indeed "generally approve[d] the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902. But the Court also recognized that the discriminatees had left the United States, perhaps without authorization to return, and although it "share[d] the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able either to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period," *id.* at 904, it nonetheless concluded that the Board's remedies must effectively be "conditioned upon the employees' legal readmittance to the United States," *id.* at 903.

b. The court of appeals in this case correctly concluded that, "[r]ead in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees." Pet. App. 7a. Rather, "[t]he Seventh Circuit originally crafted the sentence"—which neither party contested in this Court—"to deal with unique circumstances of *Sure-Tan* not present in this case." *Id.* at 7a-8a. Thus, "the Seventh Circuit crafted the restriction to ensure that the *Sure-Tan* discriminatees who had left the country would not reenter illegally to claim backpay," *id.* at 11a, and to "ensure[] that illegal reentry would not restart the accumulation of backpay," *id.* at 9a.[4] Further, this Court's "expression of precisely the same concern" is manifested by its references to such matters as "the employees' *legal readmittance to the United States*," and "the employees' *legal reentry*." *Id.* at 11a (quoting 467 U.S. at 902-903; emphasis added by court of appeals).

The court of appeals also correctly concluded that reading the "not lawfully entitled to be present and employed" sentence in *Sure-Tan* "to impose an absolute bar to any award of backpay for undocumented discriminatees" would "conflict[] with other language" in this Court's *Sure-Tan* opinion that "generally approve[d] [of] the Board's original course of action * * * by which it ordered the conventional remedy of reinstatement and backpay, leaving calculation of the precise amount of backpay until the compliance proceeding." Pet. App. 11a-12a (quoting 467 U.S. at 902 (bracketed material added by court of appeals)). Thus,

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[4] The court of appeals noted that "[t]his limitation * * * was based on the Board's standard practice of tolling backpay when discriminatees are physically unavailable, including when out of the country." Pet. App. 9a (citations omitted).

as the court of appeals observed, the "'main deficiency' in the Seventh Circuit's order, the [*Sure-Tan*] Court explained, was not that it awarded backpay to undocumented discriminatees, but that the *amount* of backpay," *i.e.*, the minimum award of six months' back pay, "was 'develop[ed] in the total absence of any record evidence as to the circumstances of individual employees'" (*id.* at 12a (quoting 467 U.S. at 899-900 n.9, 900))—in particular, without any evidence as to "the period of time these particular employees might have continued working before apprehension by the INS." *Id.* at 12a-13a (quoting 467 U.S. at 902 n.11).

The Board's limited award of back pay to Castro in this case is consistent with *Sure-Tan*, properly understood in light of its unusual facts. Because Castro remained in the United States after his unlawful discharge by petitioner, awarding him limited back pay does not promote any illegal reentry. Nor is the back pay award speculative. The record in this case demonstrates that, absent his unlawful layoff on January 31, 1989, Castro would have continued working for petitioner until June 14, 1993, at which point the facts revealed by his testimony before the Board would have required petitioner to discharge him under IRCA.

The court of appeals' reading of *Sure-Tan* is also consistent with this Court's own discussion of that decision. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), this Court observed:

> [I]n *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien's illegal presence in this country. *Retrospective sanctions against the employer may accordingly be imposed by the*

> *National Labor Relations Board to further the public policy against unfair labor practices.* But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief—reinstatement and continued employment—that probably would be granted to other victims of similar unfair labor practices.

Id. at 1047-1048 n.4 (emphasis added). The *Lopez-Mendoza* Court's reference to the availability of "[r]etrospective sanctions" under *Sure-Tan*, as distinguished from the "prospective relief" of reinstatement, indicates that *Sure-Tan* does not categorically prohibit the Board from awarding back pay to undocumented aliens.

3. The court of appeals' interpretation of *Sure-Tan* is consistent with that of two other courts of appeals. In *A.P.R.A. Fuel*, 134 F.3d at 50, the Second Circuit, relying on its earlier decision in *Rios* v. *Enterprise Association Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (1988)—a case involving back pay for undocumented aliens under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[5]—understood *Sure-Tan* "as addressing only awards of

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[5] The courts of appeals that have addressed the issue have uniformly concluded (in cases that involved operative facts occurring before enactment of IRCA) that the decision in and reasoning of *Sure-Tan* do not preclude an award of back pay to an undocumented alien who has remained in the United States under either Title VII (see *Rios*, 860 F.2d at 1173; *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989)), the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (see *Patel* v. *Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989)), or a labor arbitration agreement (see *Bevles Co.* v. *Teamsters Local 986*, 791 F.2d 1391, 1393-1394 (9th Cir. 1986), cert. denied, 484 U.S. 985 (1987)).

backpay to undocumented employees who have left the country." 134 F.3d at 54. The Second Circuit concluded that, under *Sure-Tan*, "when undocumented employees remain in the United States after their illegal termination, backpay may appropriately be awarded." *Ibid.* In so concluding, the Second Circuit also relied (*id.* at 54-55) on *Local 512, Warehouse and Office Workers' Union* v. *NLRB* (*Felbro, Inc.*), 795 F.2d 705 (1986), in which the Ninth Circuit similarly concluded that "*Sure-Tan* barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers." *Id.* at 722.

As the court of appeals noted (Pet. App. 14a), "[o]nly the Seventh Circuit has interpreted *Sure-Tan* differently." In *Del Rey Tortilleria*, the Seventh Circuit rejected, for purposes of a remedy under the NLRA, the distinction between undocumented workers who have left the country and those who remain in the United States after their unlawful discharge. 976 F.2d at 1119-1120. The Seventh Circuit concluded instead that "the plain language of the Supreme Court's opinion [in *Sure-Tan*] bars undocumented aliens from receiving backpay." *Id.* at 1119.

Although the court of appeals' reading of *Sure-Tan* in this case does conflict with that of the Seventh Circuit in *Del Rey Tortilleria*, the instant case does not present an appropriate vehicle for this Court's resolution of that disagreement. In particular, this case involves thus far atypical facts, as contrasted with the remedial setting (where the employer knowingly hires an undocumented alien) addressed by the Board's lead decision in

A.P.R.A. Fuel.[6] Indeed, the court below expressly declined to address the question of the validity of the back pay remedy ordered by the Board in cases like *A.P.R.A. Fuel*. See Pet. App. 20a. This case involves only the Board's back pay remedy for undocumented discriminatees in the situation calling for an application of the Board's after-acquired knowledge rule. See *ibid.* No court other than the court of appeals below has addressed the validity of that precise back pay remedy; indeed, in *Del Rey Tortilleria*, the Seventh Circuit addressed a back pay remedy different both from the one at issue here and from the remedy involved in *A.P.R.A. Fuel*. See *Del Rey Tortilleria*, 976 F.2d at 1117 (reviewing Board order entitling undocumented workers "to reinstatement and backpay unless the employer could prove their illegal presence by means of a final INS deportation order"). Further review, if necessary, should await a case in which a court of appeals, based on *Sure-Tan*, rejects either the Board's *A.P.R.A. Fuel* remedy or the distinct limited back pay remedy fashioned by the Board in the instant case.

Second, this Court's intervention may not be necessary to resolve the issue presented in this case. Since it

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[6] The Board has applied its *A.P.R.A. Fuel* remedy in several cases since it developed that particular remedy. See *Regal Recycling, Inc.*, 329 N.L.R.B. No. 38 (Sept. 30, 1999), slip op. 3 (ordering *A.P.R.A. Fuel* remedy); *County Window Cleaning Co.*, 328 N.L.R.B. 190, 190 n.2 (1999) (same); *Victor's Cafe 52, Inc.*, 321 N.L.R.B. 504, 504 n.3 (1996) (leaving for compliance hearing "a determination of reinstatement and backpay in accordance with" *A.P.R.A. Fuel*); *Intersweet, Inc.*, 321 N.L.R.B. 1 n.2 (1996) (same), enforced, 125 F.3d 1064 (7th Cir. 1997). By contrast, except for the present case, the Board has not, to date, had occasion to order its different after-acquired knowledge remedy in a case involving undocumented discriminatees.

decided *Del Rey Tortilleria*, the Seventh Circuit has not had occasion to apply its decision in that case. In light of the subsequent rejection of its reading of *Sure-Tan* by the District of Columbia and Second Circuits in favor of more nuanced interpretations, the Seventh Circuit may elect to revisit the question in a future case. Indeed, even at the time *Del Rey Tortilleria* was decided, four judges of the Seventh Circuit voted to rehear the case *en banc*. See 976 F.2d at 1115 n.*.[7] Moreover, a panel of the Seventh Circuit is not necessarily bound by a prior panel decision, even absent rehearing en banc. See 7th Cir. R. 40(e).

4. Petitioner also contends (Pet. 13-14) that the court of appeals has effectively sanctioned employment of an undocumented alien in violation of IRCA. That contention is wide of the mark. IRCA makes it unlawful for an employer to hire an alien only if the employer does so "knowing the alien is an unauthorized alien" or "without complying with the requirements of" the "employment verification system" prescribed by Section 1324a(b). See 8 U.S.C. 1324a(a) (1)(A)-(B)(ii); 8 U.S.C. 1324a(b) (1994 & Supp. V 1999).[8] Because petitioner did not know that Castro was an unauthorized alien at the time it hired him, and because

[7] Judge Cudahy, who had written the Seventh Circuit's opinion in *Sure-Tan*, dissented from the *Del Rey* panel majority's reading of this Court's decision in *Sure-Tan*. Judge Cudahy pointed out that the "not lawfully entitled to be present and employed in the United States" language first appeared in the Seventh Circuit's opinion, and was addressed only to aliens who have left the country. *Del Rey Tortilleria*, 976 F.2d at 1123-1124 (Cudahy, J., dissenting).

[8] In similar fashion, an INS regulation makes clear that employers are not required to terminate undocumented aliens who were hired before the effective date of IRCA. See 8 C.F.R. 274a.7.

petitioner attempted to meet its verification obligations when it hired Castro (see Pet. App. 84a-85a), it was not unlawful under IRCA for petitioner to hire Castro and to employ him until it learned of his undocumented status.[9] There is also no merit to petitioner's suggestion (Pet. 13-14) that, insofar as the court of appeals held that IRCA does not preclude the Board from awarding limited back pay to Castro, its decision conflicts with *Del Rey Tortilleria*. In that case, the Seventh Circuit stated that IRCA "clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment." 976 F.2d at 1122. That statement, however, was dictum, inasmuch as the events at issue in that case occurred prior to the effective date of IRCA. *Id.* at 1121 n.6.[10] Indeed, the court itself expressly noted that, in light of that fact, "[i]t is quite clear that IRCA itself does not control the rights of [the discriminatees in that case] to receive backpay." *Ibid.* Accordingly, the Seventh Circuit's unsupported dictum about IRCA provides no basis for this Court's review.

[9] Under 8 U.S.C. 1324a(a)(3), an employer that "establishes that it has complied in good faith with" the verification requirements of Section 1324a(b) "has established an affirmative defense" that the employer has not violated the statute's prohibition against knowingly hiring unauthorized aliens.

[10] The court's dictum is also incorrect, because, as explained above, IRCA does *not* make it unlawful for an employer to hire an unauthorized alien in every circumstance. See pp. 4-5, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2001

(1)

No. 00-1595

In The

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari: Filed April 16, 2001
Certiorari: Granted September 25, 2001

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* Page designations followed by an "a" refer to items in the appendix to Petitioner's Petition for Writ of Certiorari.

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US Court of Appeals for the DC Circuit
98-1570

HOFFMAN PLASTIC COMPOUND, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

12/2/98	PETITION FOR REVIEW CASE docketed. Petition for Review filed by Petitioner Hoffman Plstcs. [400321-1] (sha)
12/3/98	CLERK'S ORDER filed directing Petitioner to file [400322-1]: docketing statement due 1/4/99 for Hoffman Plstcs; certificate of counsel due 1/4/99 for Hoffman Plstcs; statement of issues due 1/4/99 for Hoffman Plstcs; any procedural motions due 1/4/99 for Hoffman Plstcs; deferred appendix notice due 1/4/99 for Hoffman Plstcs; any dispositive motions due 1/19/99 for Hoffman Plstcs;, directing Respondent to file [400322-2]: any procedural motions due 1/4/99 for NLRB; appearance form due 1/19/99 for NLRB; certified index to the record due 1/19/99 for NLRB; any dispositive motions due 1/19/99 for NLRB;. (sha)
12/14/98	ENTRY OF APPEARANCE filed by Attorney John Duncan Burgoyne for Respondent NLRB [402734-1]. (sha)
12/17/98	ENTRY OF APPEARANCE filed by Attorney Frederick Lee Cornnell for Respondent NLRB [403902-1]. (sha)

12/21/98 ENTRY OF APPEARANCE filed by Attorney Sharon I. Block for Respondent NLRB [404168-1]. (sha)

12/23/98 CROSS-APPLICATION for ENFORCEMENT filed (5 copies) by Respondent NLRB (certificate of service dated 12/22/98) [405055-1]. (mcm)

1/4/99 INITIAL SUBMISSIONS filed by Petitioner Hoffman Plstcs [406530-1]: docketing statement; certificate of counsel; statement of issues; deferred appendix notice (Deferred Appendix needed = Y). (mcm)

1/14/99 INITIAL SUBMISSIONS filed by Respondent NLRB [409811-1]: 28(a)(1) certificate (mam)

1/28/99 CLERK'S ORDER filed directing Respondent to file [412409-2]: certified index to the record due 2/12/99. (sha)

2/1/99 MOTION filed (5 copies) (certificate of service dated 2/1/99) to allow amicus curiae in support of NLRB [413325-1]. Motion filed by Amer Fed Labor (mam)

2/1/99 STATEMENT filed by Movant-AmicusCuriae-Respondent Amer Fed Labor pursuant to FRAP 26.1 providing corporate disclosure listing [413333-1] Certificate of Service date 2/1/99 (mam)

2/3/99 INITIAL SUBMISSIONS filed by Respondent NLRB [413888-1]: certified index to the record;. (sha)

2/23/99 CLERK'S ORDER filed granting non-party motion to allow amicus filed by Amer Fed Labor [413325-1]. (sha)

3/1/99 CLERK'S ORDER filed to schedule oral argument [419597-1] before Judge Initials: DBS JWR DST on 10/13/99; Establishing the initial briefing schedule [419597-2]: Petitioner's brief due on 5/25/99; Respondent's brief due on 6/24/99; Amicus Curiae's brief due on 7/9/99; Petitioner's reply brief due on 7/23/99; Deferred appendix due on 7/30/99 Final briefs due on 8/13/99. (cwc)

5/25/99 BRIEF filed by Petitioner Hoffman Plstcs [438163-1]. Copies: 7. Certificate of service date 5/25/99. (mcm)

5/27/99 SUPPLEMENT (errata - corporate disclosure statement) to [439261-1] brief [438163-1] filed by Petitioner Hoffman Plstcs. (mam)

6/24/99 BRIEF filed by Respondent NLRB [445152-1]. Copies: 6. Certificate of service date 6/24/99. (mcm)

7/12/99 BRIEF filed by Amicus Curiae for Respondent Amer Fed Labor [449655-1]. Copies: 15. Certificate of service date 7/9/99. (mcm)

7/23/99 REPLY BRIEF filed by Petitioner Hoffman Plstcs [451985-1]. Copies: 6. Certificate of service date 7/23/99. (mcm)

7/30/99 DEFERRED APPENDIX filed by Petitioner Hoffman Plstcs [453897-1]. Copies: 10. Certificate of service date 7/30/99. (mcm)

8/3/99 NOTICE filed by Amicus Curiae for Respondent Amer Fed Labor advising the court that they do not intend to submit a final brief and did not refer to the factual record in their initial brief which was submitted in final form. [455264-1] . Certificate of service date 8/3/99. (mcm)

8/11/99 FINAL BRIEF filed by Respondent NLRB [456201-1]. Copies: 14 certificate of service date 8/11/99. (mcm)

8/13/99 SUPPLEMENT to the DEFERRED APPENDIX (PAGES 147 & 249) lodged by Petitioner Hoffman Plstcs [456664-1]. Copies: 10. Certificate of service date 8/13/99. (mcm)

8/13/99 MOTION filed (5 copies) by Petitioner Hoffman Plstcs (certificate of service dated 8/13/99) for leave to file [456665-1] a lodged supplement to the deferred appendix [456664-1]. (mcm)

8/13/99 FINAL BRIEF filed by Petitioner Hoffman Plstcs [456817-1]. Copies: 14. Certificate of service date 8/13/99. (mcm)

8/13/99 FINAL REPLY BRIEF filed by Petitioner Hoffman Plstcs [456829-1]. Copies: 14 . Certificate of service date 8/13/99. (mcm)

8/20/99 CLERK'S ORDER filed granting motion to supplement the deferred appendix filed by Hoffman Plstcs [456665-1] Directing Clerk to file the lodged documents as a supplement to the deferred appendix [456664-1] . [Entry Date: 8/20/99] (cwc)

8/20/99 PER ABOVE ORDER lodged supplement to the deferred appendix [456664-1] is filed. (cwc)

9/21/99 PER CURIAM ORDER filed to allocate oral argument times: APET minutes-15 ERES minutes-15. [464744-1], one counsel per side to argue. [464744-2] Oral argument scheduled for 10/13/99, Form 72 notice of attorney arguing case – [464744-3] due 10/6/99. [Entry Date: 9/21/99] (cwc)

9/29/99 MOTION filed (5 copies) by Amicus Curiae for Respondent Amer Fed Labor (certificate of service dated 9/29/99) for leave to participate in oral argument [466996-1]. (mcm)

10/1/99 PER CURIAM ORDER filed granting motion of American Federation of Labor and Congress of Industrial Organizations to participate in oral argument. Three minutes of the Board's time is ceded to amicus. [466996-1] Entry Date: 10/1/99] (lej)

10/5/99 FORM filed by Attorney Marsha Siegel Berzon for amicus curiae [468185-1] regarding, Form 72 notice of attorney arguing case – [468185-2]. (gde)

10/6/99 FORM filed by Attorney Maurice Baskin for petitioner [468183-1] regarding, Form 72 notice of attorney arguing case – [468183-2]. (gde)

10/8/99 FORM filed by Attorney Sharon I. Block for respondent [468867-1] regarding, Form 72 notice of attorney arguing case – [468867-2]. (gde)

10/13/99 ORAL ARGUMENT HELD before Sentelle, Rogers, Tatel. (gde)

11/5/99 LETTER filed by Amicus Curiae for Respondent Amer Fed Labor pursuant to FRAP 28j advising of additional authorities [475215-1]. Certificate of service date 11/2/99. (cwc)

3/17/00 JUDGMENT for the reasons in the accompanying opinion denying petition for review [400321-1] filed by Hoffman Plstcs & granting cross-application for enforcement filed by NLRB [405055-1]. Before Judges Sentelle, Rogers, Tatel. [Entry Date: 3/17/00] (edb)

3/17/00 OPINION (34 pgs) for the Court filed by Judge Tatel, DISSENTING OPINION (7 pgs) filed by Judge Sentelle. (edb)

3/17/00 CLERK'S ORDER filed The Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing. [Entry Date: 3/17/00] (edb)

3/24/00 LETTER filed by Amicus Curiae for Respondent Amer Fed Labor terminating involvement of attorney Berzon [505799-1] (Judge Berzon was recently confirmed as a judge on the Court of Appeals for the Ninth Circuit). Certificate of service date 3/17/00. (mam)

3/24/00 REQUEST filed by Respondent NLRB bill of costs [505851-1]. Certificate of service date 3/23/00. (mam)

5/1/00 SUGGESTION filed (19 copies) by Petitioner Hoffman Plstcs certificate of service dated 5/1/00) for rehearing in banc [518057-1] (mcm)

5/5/00 CLERK'S ORDER filed directing respondent to respond to the petitioner's suggestion hearing in banc [518057-1] and to do so on or before May 22, 2000. A reply to the response will not be accepted by the court [Entry Date: 5/19/00] (mcm)

5/22/00 RESPONSE filed [518896-1] (5 copies) by Respondent NLRB certificate of service dated 5/22/00) to the petitioners suggestion for rehearing en banc [518057-1]. (mcm)

6/16/00 PER CURIAM ORDER, In Banc, filed granting suggestion rehearing in banc filed by Hoffman Plstcs [518057-1] and vacating the court's 3/17/00 judgment. Order governing

further proceedings will issue at a later date. [504120-1]. Before Judges Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. Circuit Judge Garland did not participate in this matter. [Entry Date: 6/19/00] (mam)

6/26/00 PER CURIAM ORDER, In Banc, filed that oral argument before the court en banc will be heard on Wednesday, 9/27/00 at 9:30 a.m. [525528-1] The parties shall submit thirty copies of each of the briefs and appendices previously filed by 8/25/00. The following supplemental briefing schedule shall apply: [525528-2]: Petitioner's brief due on 8/2/00; Respondent's brief due on 8/17/00; Petitioner's reply brief due on 8/25/00. Before Judges Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland*. Circuit Judge Garland did not participate in this matter. [Entry Date: 6/26/00] (lej)

7/10/00 MOTION filed (19 copies) by Amicus Curiae for Respondent Amer Fed Labor (certificate of service dated 7/10/00) for leave to file [528594-1] a brief. (mam)

7/19/00 PER CURIAM ORDER, In Banc, filed granting motion filed by Amer Fed Labor for leave a file a brief as an amicus curiae on rehearing [528594-1]; Amicus briefs due on or before 8/17/00. [530835-1]. Before Judges Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. [Entry Date: 7/19/00] (cwc)

8/2/00 SUPPLEMENTAL BRIEF filed by Petitioner Hoffman Plstcs [534749-1]. Copies: 30. Certificate of service (mcm)

8/3/00 TRANSCRIPT of oral argument held on 9/27/00. [400319-1] (mam)

8/4/00 BRIEF filed by Amicus Curiae for Respondent Amer Fed Labor [534871-1]. Copies: 30. Certificate of service date 8/4/00 (Judge Marsha Berzon appears on brief and was terminated as counsel in this case on 3/24/00) (mcm)

8/8/00 TRANSCRIPT (corrected) of oral argument held on 9/27/00. [400319-1] (mam)

8/15/00 SUPPLEMENTAL BRIEF filed by Respondent NLRB [537310-1]. Copies: 30. Certificate of service date 8/15/00. (mcm)

8/16/00 SUPPLEMENTAL BRIEF filed by Amicus Curiae for Respondent Amer Fed Labor [537348-1]. Copies: 30. Certificate of service date 8/16/00. (mcm)

8/22/00 BRIEF filed by Petitioner Hoffman Plstcs [538813-1]. Copies: 30. Certificate of service date 8/22/00. [REPLACED WITH CORRECTED FILING ON 9/1/00 – ID# 540958] (mcm)

8/22/00 REPLY BRIEF filed by Petitioner Hoffman Plstcs [538814-1]. Copies: 30. Certificate of service date 8/22/00. (mcm)

8/22/00 BRIEF filed by Respondent NLRB [538815-1]. Copies: 30. Certificate of service date 8/22/00. (mcm)

8/22/00 JOINT APPENDIX filed by Petitioner Hoffman Plstcs [538818-1] Copies: 30. Certificate of service date 8/22/00. (mcm)

8/22/00 SUPPLEMENT [539434-1] to appendix (errata to appendix) [538818-1] lodged by

Petitioner Hoffman Plstcs. (Note: attached to motion for leave to supplement deferred appendix). (mam)

8/22/00 MOTION filed (5 copies) by Petitioner Hoffman Plstcs (certificate of service dated 8/13/00) for leave to file [539440-1] a supplement to appendix [539434-1]. (mam)

8/25/00 SUPPLEMENTAL REPLY BRIEF filed by Petitioner Hoffman Plstcs [540304-1]. Copies: 30. Certificate of service date 8/25/00. (mam)

9/1/00 BRIEF filed by Petitioner Hoffman Plstcs [540958-1]. Copies: 30. Certificate of service date 8/13/99. [REPLACES COPIES OF BRIEF FILED ON 8/22/00 – ID#538813] (mcm)

9/14/00 PER CURIAM ORDER, In Banc, filed to allocate oral argument times: APET minutes-30 ERES minutes-30. [543319-1], Form 72 notice of attorney arguing case – [543319-2] due 9/21/00. [Entry Date: 9/14/00] (cwc)

9/21/00 PER CURIAM ORDER, In Banc, filed granting motion leave to file filed by Hoffman Plstcs [539440-1] Directing Clerk to file the lodged supplement to the deferred appendix [539434-1]. Before Judges Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, ~~Tatel.~~ [Entry Date: 9/21/00] (lej)

9/21/00 FORM filed by Attorney James B. Coppess [545166-1] regarding, Form 72 notice of attorney arguing case – [545166-2]. (cco)

9/22/00 FORM filed by Attorney Maurice Baskin [545381-1] regarding, Form 72 notice of attorney arguing case – [545381-2]. (cco)

9/22/00 FORM filed by Attorney Sharon I. Block [545384-1] regarding, Form 72 notice of attorney arguing case – [545384-2]. (cco)

9/27/00 ORAL ARGUMENT HELD before Edwards, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland. (cco)

1/16/01 JUDGMENT denying petition for review and granting cross-application for enforcement for the reasons stated in the accompanying opinion. Before Judges Edwards, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. [Entry Date: 1/17/01] (deb)

1/16/01 IN BANC OPINION (21 pgs) for the Court filed by Judge Tatel, DISSENTING OPINION (12 pgs) filed by Judge Sentelle, DISSENTING OPINION (1 pgs) filed by Judge Ginsburg. (deb)

2/16/01 CLERK'S ORDER filed granting request for costs filed by NLRB [505851-1]. Costs will be awarded to NLRB in the amount of $117.60 and taxed against Hoffman Plastic Compound, Inc. Costs are payable between parties and should not be submitted to the Clerk. [Entry Date: 2/16/01] (deb)

2/16/01 MANDATE ISSUED to NLRB [576697-1]. (deb)

4/20/01 LETTER dated April 19, 2001 for the Clerk of the Supreme Court of the US. The petition for a writ of certiorari in this case was filed April 16, 2001 and placed on the docket

April 18, 2001 as No. 00-1595. . Certificate of service date. (lme)

9/28/01 LETTER filed by Clerk stating Supreme Court granting Petition for Writ of Certiorari [628517-1] Certificate of service date 9/28/01. (mpt)

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No. 00-1595

In The

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari To The United States Court of Appeals
For The District of Columbia Circuit

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QUESTION PRESENTED FOR REVIEW

Whether an undocumented alien who—without his employer's knowledge—obtained employment by presenting fraudulent immigration documents, is entitled to backpay as compensation for a violation of the National Labor Relations Act if the undocumented alien never was legally present or legally authorized to work in the United States during the backpay period.

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no other parties or subsidiary companies that are required to be listed pursuant to Supreme Court Rule 29.6:

Petitioner herein:

Hoffman Plastic Compounds, Inc.

Respondents herein:

National Labor Relations Board

Victoria E. Aguayo, Regional Director, Region 21, NLRB

Amicus Curiae below:

AFL-CIO

Other Interested Parties:

Samuel Perez (aka Jose Castro)

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OPINIONS BELOW

The en banc ruling of the United States Court of Appeals for the District of Columbia Circuit is reported as *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 237 F.3d. 639 (D.C. Cir. 2001) (Appendix to Writ of Certiorari ("App.") 1a). The ruling of the National Labor Relations Board is reported as *Hoffman Plastic Compounds, Inc. and Casimiro Arauz*, 326 N.L.R.B. 1060 (1998) (App. 78a). The decision of the administrative law judge is an attachment to 326 N.L.R.B. 1060 (1998). (App. 88a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. (App. 98a).

STATUTES INVOLVED IN THIS CASE

8 U.S.C. § 1324a (App. 99a).

8 U.S.C. § 1324c (App. 102a).

18 U.S.C. § 1546 (App. 103a).

29 U.S.C. § 160(c) (A1).

STATEMENT OF THE CASE

Hoffman Plastic Compounds, Inc. ("Hoffman") manufactures polyvinyl chloride pellets at its facility in Paramount, California. (App. 5a). In May 1988, Hoffman hired an employee that it knew only as "Jose Castro" to work as a compounder in its Paramount facility. (App. 5a, 92a-94a). On January 31, 1989, Hoffman laid off several

employees, including Castro. (App. 89a). The NLRB later determined that the layoff of these employees violated the National Labor Relations Act ("NLRA") and ordered Hoffman to cease and desist from further violations, offer reinstatement to each of the employees and make them whole for any losses they incurred, and post a notice regarding the remedial order. (App. 88a); *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100 (1992). Thereafter, a dispute arose regarding the proper computation of backpay and the NLRB convened a compliance proceeding. (App. 88a).

On June 14, 1993, Castro appeared before an administrative law judge to testify at the Board's compliance proceeding. (App. 79a, 92a). There, Castro falsely testified that "Jose Castro" was his true name. (App. 79a-80a, 92a; Petitioner Hoffman Plastic Compounds, Inc.'s Petition for Rehearing En Banc p. 2, n.1 (filed May 1, 2000)). Then, he admitted that he was born in Mexico and used a friend's birth certificate and a false driver's license and false social security card to obtain employment at Hoffman. (App. 92a).

In November 1993, the administrative law judge issued his decision regarding backpay for Castro. (App. 88a, 95a).[1] With respect to the facts of the case, the ALJ determined that: (1) Castro used a fraudulent birth certificate for immigration purposes; (2) Castro used this false

1 The ALJ also considered whether another employee, Moises Gonzales, was entitled to backpay. Because there was no evidence suggesting that Gonzales was an undocumented worker, the ALJ awarded Gonzales backpay from the date of his discharge until the date that he failed to appear for work after receiving a valid offer of reinstatement. (App. 91a, 95a). The ALJ also approved settlements between Hoffman and the NLRB regarding the backpay claims of Mauricio Mejia and Casimiro Arauz (App. 88a).

identification to obtain employment in the United States; (3) prior to the compliance proceeding, Hoffman had no knowledge that Castro was not lawfully authorized to work in this country; and (4) prior to the compliance proceeding, Castro never attempted to become legally authorized to work in the United States. (App. 92a-94a).

In considering whether Castro was entitled to backpay, the ALJ examined this Court's holding in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984) and the Immigration Reform and Control Act of 1986 ("IRCA"). (App. 92a-94a). The ALJ determined that Hoffman had complied with IRCA and concluded that Castro was not entitled to either reinstatement or backpay because, under *Sure-Tan*, backpay is "tolled during any period when a discriminatee is not lawfully authorized to work in this country" and Castro never was lawfully authorized to work during the backpay period. (App. 92a-94a).

Nearly five years later, the NLRB reversed the ALJ's decision.[2] On September 23, 1998, two members of a three-

2 The ALJ's decision regarding backpay for Castro initially came before the Board for review on July 29, 1994. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683 (1994). The Board stated:

> "We have carefully reviewed the judge's decision with respect to the remedial obligation owed by the Respondent to discriminatee Jose Castro and find that this issue merits further consideration. Accordingly, the portion of the judge's recommended Order with respect to Castro is severed and is subject to further consideration by the Board."

314 N.L.R.B. 683, n.1. Inexplicably, the Board waited more than four years to reach any decision regarding backpay for Castro.

member Board panel[3] decided that, notwithstanding the plain language of *Sure-Tan*, Castro was entitled to backpay from the date of his layoff until June 14, 1993, when Hoffman first learned that Castro used fraudulent identification to obtain employment. (App. 85a-87a). Thus, the Board awarded Castro more than four years' backpay even though he never was legally present or entitled to work in the United States during the backpay period.

On December 2, 1998, Hoffman filed a Petition for Review of the Board's decision with the United States Court of Appeals for the District of Columbia Circuit, which had jurisdiction pursuant to 29 U.S.C. § 160(f). (Jt. App. 1). The NLRB subsequently filed a cross-application for the enforcement of its order. (Jt. App. 2). The Court of Appeals rendered its initial decision on March 17, 2000. (App. 37a). In a 2-1 decision, the Court of Appeals affirmed the NLRB's backpay award to Castro. (App. 37a-77a).

Hoffman timely filed a Petition for Rehearing En Banc. (Jt. App. 6). The Court of Appeals granted that petition and vacated its earlier order. (App. 96a). On January 16, 2001, the Court of Appeals issued another divided opinion. (App. 1a). In a 5-4 decision, the Court of Appeals again narrowly affirmed the NLRB's backpay award. (App. 1a-36a).[4]

[3] The third member dissented, stating that *Sure-Tan* and IRCA precluded an award of backpay to Castro. (App. 87a).

[4] Judges Sentelle, Ginsburg, Henderson and Randolph dissented.

Hoffman filed a Petition for Writ of Certiorari with this Court on April 16, 2001. This Court granted the petition on September 25, 2001.

SUMMARY OF ARGUMENT

Jose Castro entered this country illegally. He committed another illegal act when he obtained employment at Hoffman by presenting fraudulent immigration documents. And, he compounded his prior unlawful acts by remaining in this country illegally for at least four years following his discharge from Hoffman and by lying under oath about his true identity. Thereafter, the NLRB rewarded Castro for his illegal conduct by awarding him more than four years of backpay.

The issue before the Court in this case is whether the NLRB acted properly in awarding Castro, an admitted illegal alien, backpay under the NLRA when he never was legally present or legally authorized to work in this country during the backpay period. To resolve this issue, the Court need look no further than its own precedent, which the NLRB and the D.C. Circuit ignored in this case, and the Second and Ninth Circuits have ignored in similar cases.

In *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), this Court directed the National Labor Relations Board that, when considering backpay for an undocumented alien, "the employee[] must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when [the employee was] not lawfully entitled to be present and employed in the United States." *Id.* at 903. By affirming the NLRB's award of backpay to Castro, the D.C. Circuit disregarded this Court's instruction in *Sure-Tan*. As the NLRB itself has previously advocated, *Sure-Tan* stands for

the proposition that a worker who is not both lawfully present and legally authorized to obtain work in the United States may not receive backpay as compensation for a violation of the NLRA.[5] The D.C. Circuit's refusal to follow *Sure-Tan's* instruction requires reversal.

In affirming the Board's backpay award to Castro, the D.C. Circuit also disregarded this country's immigration laws and policies. With the passage of the Immigration Reform and Control Act ("IRCA") in 1986, Congress made it unlawful for employers to knowingly hire undocumented aliens and reaffirmed that undocumented aliens who use fraudulent documentation to obtain employment in this country do so illegally. Since the passage of IRCA, no other court has required an employer who hired an undocumented alien without any knowledge of the alien's undocumented status to compensate that undocumented alien with backpay for a violation of the NLRA. By awarding backpay to Castro in contravention of IRCA, the D.C. Circuit erred and its order must be reversed.

[5] *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 716 (9th Cir. 1986) ("[T]he NLRB interpreted this last statement by the Court to mean that an undocumented alien would *never* be entitled to backpay....") (emphasis in original).

ARGUMENT

I. *Sure-Tan* Conclusively Prohibits An Award Of Backpay To Undocumented Aliens Like Castro

A. *Sure-Tan v. NLRB*

Whether undocumented aliens may recover backpay as compensation for an unlawful discharge was first addressed by this Court in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). In *Sure-Tan*, after a union was elected as the employees' collective bargaining representative and in an apparent attempt to invalidate the election, the employer alerted the Immigration and Naturalization Service ("INS") that several of its employees might be undocumented aliens. 467 U.S. at 886-87. The INS investigated and determined that several of Sure-Tan's employees were "living and working illegally in the United States . . . ." *Id.* at 887. Upon threat of deportation, these employees voluntarily left the country. *Id.* The NLRB later concluded that Sure-Tan's report to the INS constituted an unfair labor practice and issued a cease and desist order. *Id.* at 887-88. The Board declined to issue a reinstatement and backpay order, however, because the Board could not determine whether the employees had legally reentered the country and because the Board had no evidence regarding the employees' legal availability to work during the traditional backpay period. *Id.* at 889.

On appeal, the Seventh Circuit modified the Board's remedial order. *Id.* at 889-90. The Seventh Circuit held that Sure-Tan was required to reinstate the employees once the employees were legally present and free to work in the United States. *Id.* at 889. With respect to backpay, the Seventh Circuit opined that the discharged employees

should be deemed unavailable for work during any period when they were not legally entitled to be present and employed in the United States. *Id.* at 890. Recognizing that the employees would likely be entitled to no backpay under this standard, however, the Court of Appeals suggested that the Board order Sure-Tan to pay six months of backpay to each employee. *Id.* The Board agreed. *Id.* Accordingly, the final order approved by the Seventh Circuit awarded six months of backpay to each affected employee. *Id.*

This Court reversed the Seventh Circuit's remedial order. *Id.* at 898-906. In considering the remedy to which the undocumented aliens might be entitled, this Court held that the Board's traditional remedies of reinstatement and backpay "must be conditioned upon the employee's legal readmittance to the United States." *Id.* at 902-03. Indeed, this Court cautioned that in assessing remedies under the NLRA, "the Board is obliged to take into account another equally important congressional objective—to wit, the objective of deterring unauthorized immigration that is embodied in the [Immigration and Nationality Act]." *Id.* at 903. Given these competing objectives, the Court held that, with respect to backpay, "the employees must be deemed *'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.*" *Id.* (emphasis added).

In so holding, this Court recognized that the discharged employees would very likely be left without any remedy whatsoever:

> "We share the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able either to enter the country lawfully to accept the reinstatement offers or to establish at the compliance proceedings that they were lawfully available for employment during the backpay period. The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act."

Id. at 904.

As the foregoing discussion demonstrates, *Sure-Tan* conclusively prohibited the Board from awarding backpay to undocumented aliens who were not legally present and entitled to work during the backpay period. The Board has previously accepted, without question, that this was the holding of the Court. *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 716 (9th Cir. 1986) ("[T]he NLRB interpreted this last statement by the Court to mean that an undocumented alien would *never* be entitled to backpay....")(emphasis in original). And, even *Sure-Tan's* critics agreed that this was the Court's holding. *See Sure-Tan*, 467 U.S. at 912 (J. Brennan, dissenting) (referring to "the Court's decision to restrict drastically the remedies available to undocumented alien employees").[2] The D.C. Circuit's

[2] *See also, Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 655 (D.C. Cir. 2001) (J. Sentelle, dissenting) (quoting Terry A. Bethel, Recent Labor Law Decisions of the Supreme Court, 45 Md. L. Rev. 179, 196 (1986) ("*Sure-Tan* ... deprive[s] undocumented employees of any effective remedy for unlawful discrimination

approval of a backpay award to Castro completely ignores this Court's holding in *Sure-Tan.*

B. The District of Columbia Court of Appeals Erred by Refusing to Adhere to This Court's Holding in *Sure-Tan*

Despite this Court's clear and unequivocal holding in *Sure-Tan,* the District of Columbia Court of Appeals refused to apply it in this case. Here, it is undisputed that Castro entered the United States illegally and illegally obtained employment at Hoffman by using a fraudulent birth certificate. It also is undisputed that Castro never was legally present or legally authorized to work in the United States during the backpay period. The outcome in this case is, therefore, controlled by this Court's words in *Sure-Tan*—backpay must be "tolled" during "any period when the undocumented worker [is] not lawfully entitled to be legally present and employed in the United States." Because Castro was neither lawfully present nor lawfully entitled to employment during the backpay period, *Sure-Tan* requires that he be denied backpay.

The D.C. Circuit agreed that, "[r]ead literally," *Sure-Tan* stands for the proposition that an undocumented alien who is not legally present or legally entitled to employment is not entitled to backpay. *Hoffman Plastic Compounds, Inc. v. NLRB,* 237 F.3d 639, 642 (D.C. Cir. 2001). However, the

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...."); Lucinda M. Cardinal, Note, *Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce,* 7 Cardozo L. Rev. 223, 224 (1985) ("*Sure-Tan* mandates that illegal aliens do not receive the remedies granted their legal coworkers."); John W. Sagaser, Note, *Rights Without A Remedy – Illegal Aliens Under the National Labor Relations Act,* 27 B.C. L. Rev. 407, 452 (1986) ("By denying a minimum backpay award, the Court in effect deprives illegal alien workers of any remedy.")).

majority maintains that it is not restricted by this proposition.

Indeed, the majority contends that rather than barring backpay to undocumented aliens, "[p]roperly understood, *Sure-Tan* supports backpay awards to undocumented discriminatees ...." *Id.* at 640.

To understand *Sure-Tan* in such a way, however, the majority is forced to weave a web of complicated theories, which twist *Sure-Tan's* language beyond comprehension. This complicated re-construction of *Sure-Tan* begins with the majority's erroneous conclusion that the crucial sentence—"the employees must be deemed unavailable for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States"—did not address any issue before the *Sure-Tan* Court. *Id.* at 642. The majority states that this language, "form[s] no part of *Sure-Tan's* holding or reasoning," *Id.* at 644, and is "hardly ... dictum." *Id.* at 642. The majority's conclusion boggles the mind. In a concise sentence, the *Sure-Tan* Court made it perfectly clear that backpay was indeed an issue before it. Even the majority acknowledges that this Court in *Sure-Tan* was faced with an issue regarding the "minimum backpay award." *Id.* at 643.

To further justify its departure from *Sure-Tan,* the majority contends that the Court in *Sure-Tan* did not mean what it plainly said. The D.C. Circuit maintains that this Court's holding regarding the tolling of backpay was intended only to eliminate the incentive for illegal aliens to illegally re-enter the United States. The majority reasons that, because the *Sure-Tan* discriminatees had left the country, that *Sure-Tan* stands for the proposition that only those undocumented workers who absent themselves from the country during the backpay period are ineligible for

backpay.[2] *Id.* at 642-44. Of course, this Court never expressed such a restriction and by imposing the previously unexpressed restriction as it did in this case, the D.C. Circuit obliterated *Sure-Tan's* controlling language. By limiting *Sure-Tan's* holding to those illegal aliens who leave the country, the majority construes the phrase, "not lawfully entitled to be present and employed," to read simply, "not present." The majority entirely disregards whether the alien's presence in this country is lawful or unlawful and ignores whether the alien is legally entitled to work.

To be sure, the *Sure-Tan* Court was concerned with deterring unauthorized immigration. To guard against illegal entry, the Court stated:

[2] In misconstruing *Sure-Tan* in this way, the D.C. Circuit merely followed the misguided lead of the Ninth and Second Circuits. In *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986), the NLRB maintained that *Sure-Tan* prohibited backpay awards to those alien workers who, although physically present in the United States, could not demonstrate that they were lawfully present and entitled to work in this country. *See, supra* n. 5. In a split decision, the Ninth Circuit ignored the Board's reasonable reading of *Sure-Tan* and held that *Sure-Tan* barred backpay only to those undocumented workers who were unavailable for work during the backpay period because they were outside the United States. *Id.* at 717-19. The Second Circuit twice repeated the Ninth Circuit's errors. *Rios v. Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (undocumented aliens who failed to interrupt their illegal stay in this country awarded backpay under Title VII of the Civil Rights Act of 1964); *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.2d 50, 55 (2d Cir. 1997) (reaffirming erroneous holding in *Rios* that *Sure-Tan* applies only to undocumented aliens who leave the country during the backpay period).

> "[A]s the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective' – to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided."

467 U.S. at 902-03.

It is unsurprising that the Court focused on legal reentry as a prerequisite to reinstatement, however. Without legal reentry, the Sure-Tan employees who had left the country could not be lawfully reinstated.

However, the Court's discussion regarding backpay was not so narrowly constrained. The Court stated:

> "Similarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

Id. at 903.

Nowhere does the Supreme Court expressly state that the backpay portion of its decision applies only to those illegal aliens who depart the country. Instead, the Court's holding sweeps more broadly and denies backpay not only to those illegal aliens who are not present in the United States, but also to those who, like Castro, are not legally present or legally entitled to be employed in the United States.

Even the majority has difficulty reconciling *Sure-Tan's* broad language with its narrow interpretation:

> "It is true, as Hoffman points out, that the words 'not lawfully entitled to be present and employed' sweep more broadly than necessary to deter undocumented discriminatees from reentering the country illegally."

237 F.3d. at 644.

Once again however, the majority elects to disregard *Sure-Tan's* plain language because, in the majority's opinion, to do otherwise would "conflict[] with other language ... making it clear that undocumented discriminatees are in fact entitled to backpay." *Id.*

The "other language" from *Sure-Tan* that the majority seizes upon is as follows:

> "We generally approve the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations

> as to the amounts of backpay, if any, due these employees."

Id. (citing 467 U.S. at 902).

However, this Court's general approval of the Board's traditional remedies is not at odds with the backpay limitation that it imposed in *Sure-Tan.* As Judge Sentelle points out in his dissent, this Court's general acceptance of these remedies "no more compels us to uphold a backpay award to an employee not lawfully entitled to employment than it compels us to uphold illegal reinstatement of the same employee." 237 F.3d. at 653.

Nor is the entitlement to a compliance proceeding somehow inconsistent with *Sure-Tan's* backpay prohibition. The Supreme Court in *Sure-Tan* remanded the case to the NLRB to determine "whether any of the discharged employees will be able...to establish at the compliance proceedings that they were lawfully available for employment during the backpay period." 467 U.S. at 904, 906. In so doing, the Court recognized that the discharged employees would likely not be able to establish any entitlement to backpay at the compliance hearing. Indeed, the Court stated, "[t]he probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act." *Id.* at 904. Thus, a compliance proceeding is no guarantee to backpay, but simply a procedural step that must occur before backpay, if any, is awarded.

As demonstrated, the D.C. Circuit went astray at every step in its analysis of *Sure-Tan* and its application of

Sure-Tan to the instant case. Reversal by this Court is required to remedy these errors.

C. The *Hoffman* Dissenters Correctly Applied *Sure-Tan* and Appropriately Harmonized the NLRA with the Immigration Laws

Unlike the strained interpretation of *Sure-Tan* offered by the D.C. Circuit majority, the dissent advocates the more straight-forward and logical approach. Writing for the dissent, Judge Sentelle focused on the plain meaning of this Court's holding in *Sure-Tan*:

> "[T]he Supreme Court has made clear the state of the law: 'employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.' Read in context, read out of context, or read both ways and compared, the majority is left with no way of dealing with the High Court's plain statement. I invite the reader to review the phrase, 'not lawfully entitled to be present and employed' in its original context. I further suggest that contextual illumination for this sentence of the High Court's opinion is supplied in the Court's analysis of the Seventh Circuit opinion that it was reversing. The High Court described that decision as 'recognizing that the discharged employees would most likely not have been lawfully available for employment and so *would receive no backpay award at all* ...." *Sure-Tan*, 467 U.S. at 890 (emphasis added). Thus, the governing factor in determining eligibility for backpay awards is not mere presence, but also the lawful entitlement to be present and to be employed."

Hoffman Plastic Compounds, Inc., 237 F.3d at 655.

By urging the conditioning of backpay on legal presence and legal authorization to work, the dissent respects this Court's holding in *Sure-Tan* and appropriately harmonizes the NLRA with the immigration laws. As this Court has stated, undocumented aliens who are subjected to a violation of the NLRA are treated as "employees" under the Act and, therefore, may be protected from further violations of the Act by a cease and desist order, such as the one in place in this case.[8] Thus, the objectives of the NLRA are satisfied. By refusing to award backpay to an undocumented alien who illegally entered this country and unlawfully obtained employment through the use of fraudulent immigration documents, the dissent also respects a primary goal of the immigration laws—deterring unauthorized immigration.

The Seventh Circuit approved of this approach in *Del Rey Tortilleria v. NLRB*, 976 F.2d 1115 (7th Cir. 1992). There, the Seventh Circuit was presented with the same issue confronted by the D.C. Circuit here—whether an undocumented alien who remains in the United States is ineligible for backpay under the NLRA by virtue of his undocumented status. The Seventh Circuit correctly held that such undocumented aliens are not entitled to backpay as a matter of law. After analyzing the *Sure-Tan* opinion at length, the Seventh Circuit held that *Sure-Tan* barred undocumented aliens from receiving backpay regardless of

[8] *Sure-Tan*, 467 U.S. at 891-94 (extending coverage of NLRA to undocumented aliens), 898, n.8 (noting that a cease and desist order was imposed by the NLRB in *Sure-Tan* and that violation of the cease and desist order would subject Sure-Tan to contempt sanctions).

their physical presence in the United States during the backpay period:

> "The [*Sure-Tan*] Court seemed to determine that the policy behind the INA—'the objective of deterring unauthorized immigration'—required the employees to show that they were lawfully available for employment during the backpay period. Otherwise, undocumented aliens would be rewarded by the NLRB for entering the United States illegally."

Id. at 1119.

The dissent's approach in this case also was embraced by the sole dissenting judge in *Local 512 Warehouse & Office Workers' Union v. NLRB,* 795 F.2d 705 (9th Cir. 1986). In *Local 512,* Judge Beezer strenuously objected to the Ninth Circuit's disregard of *Sure-Tan,* stating:

> "[The *Sure-Tan* Court's] reference to 'legal availability for work' and the query as to whether the aliens were 'lawfully available for employment' ... confirms the Court's intent that legal immigration status be a crucial relevant factor in determining whether backpay is tolled. *The essence of the Court's ruling is that an alien worker is entitled to backpay for a lay-off or discharge in violation of the labor laws only when that alien has been legally present in the United States and authorized by the government to obtain employment during the backpay period.*
>
> ...

> The unstated premise behind this holding appears to be that an undocumented alien has not been legally harmed by a lay-off or termination. *An alien who had no right to be present in this country at all, and consequently no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement.* It may promote the purpose of the NLRA to guarantee the collective bargaining rights of the NLRA to every employee, regardless of immigration status. But the award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have truly suffered harm. Undocumented aliens, who often enter into the United States without inspection in violation of federal criminal law, are not harmed by removal from employment they could obtain only after such an unlawful entry and can retain only through continued unlawful presence."

795 F.2d at 724, 725-26 (J. Beezer, dissenting)(emphasis added).

This Court has spoken with regard to whether an undocumented alien is entitled to backpay under the NLRA. In *Sure-Tan,* this Court stated that an undocumented alien "must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when the [employee was] not lawfully entitled to be present and employed in the United States." Thus, despite the *Hoffman* majority's attempts to confuse the issue by taking *Sure-Tan*

out of context, the resolution of this case is really quite simple. Castro never was lawfully present during the backpay period and he never was lawfully entitled to work during the backpay period. Consequently, he was not entitled to backpay under *Sure-Tan* and the decision of the D.C. Circuit must be reversed.

II. The Immigration Laws Prohibit An Award of Backpay to Castro

A. IRCA and the INA

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA") to control illegal immigration to the United States. H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess. 45, *reprinted in* 6 U.S.S.C.A.N. 5649, 5649-50. IRCA sets forth a comprehensive employer verification system. 8 U.S.C. § 1324a. It is the goal of this system to deny employment to undocumented aliens, thus depriving them of the incentive to illegally enter the United States. To enforce this verification system, IRCA makes it unlawful for any employer to knowingly hire or continue to employ an unauthorized alien. 8 U.S.C. § 1324a(a)(1)-(2). Because Congress recognized that the employer verification system would very likely result in the increased manufacture and use of fraudulent immigration documents, IRCA also makes it unlawful for any person to obtain employment by presenting documentation that falsely represents his immigration status, 8 U.S.C. § 1324c(a), and makes it a crime to use an identification document "knowing that the document was not issued lawfully for the use of the possessor, [or] ... that the document is false." 18 U.S.C. § 1546(b).

"IRCA effected a monumental change in our country's immigration policy by criminalizing the hiring of

unauthorized aliens." *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999).[2] Even those courts that improperly applied *Sure-Tan* recognized that IRCA would impact future awards of backpay to undocumented workers. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n.11 (9th Cir. 1989) ("it may well be that this recent legislation changes the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover back pay ...."); *Rios v. Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1172 n.2 (2d Cir. 1988) ("We recognize that the law in this area has changed with the passage of the Immigration Reform and Control Act of 1986").

Indeed, the Board itself acknowledged that IRCA would curtail backpay to undocumented aliens. During oral argument in *Sure-Tan*, Mr. Kneedler, who represented the Board, had the following exchange with the Court:

> "QUESTION: There is legislation pending in Congress to make it illegal, to make it an unlawful act, a crime to hire an undocumented alien. Suppose that legislation passed. Would the board or anybody else be entitled to make a remedy that would give back pay?
>
> MR. KNEEDLER: Oh, I would certainly think not.
>
> QUESTION: Not if they pass that legislation.

2 *See also, Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 (7th Cir. 1992)("Section 274A of IRCA, 8 U.S.C. § 1324a(a), makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment").

> MR. KNEEDLER: No, if the employment – in no circumstances. *The employment relationship would then become illegal, and for the board to order the reinstatement of the employee to an illegal relationship and to pay him inconsistent with such a statute would clearly be improper ....*"

Oral Argument in *Sure-Tan v. NLRB* (December 6, 1983), 1983 U.S. Trans LEXIS 5, *47-*48 (emphasis added).

B. The Court of Appeals Improperly Deferred to the NLRB

Despite the Board's prior acknowledgment that an award of backpay to an undocumented alien would condone an illegal relationship and "would clearly be improper" under IRCA, the Board awarded more than four years of backpay to Castro. Not only did Castro enter this country illegally, but he also illegally obtained employment at Hoffman by presenting fraudulent documentation. Because Castro's illegal acts implicated this country's immigration laws, the NLRB was required to tailor its remedy to avoid any conflict between the NLRA and the INA and IRCA. *Sure-Tan*, 467 U.S. at 903 ("In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective' – to wit, the objective of deterring unauthorized immigration that is embodied in the INA."). By awarding backpay to Castro, the NLRB failed to properly account for the objectives of the immigration laws. The D.C. Circuit failed to correct this error when it affirmed the NLRB's backpay award.

The D.C. Circuit justified its failure to correct the Board's error by deferring to the judgment of the NLRB. In considering the potential policy conflicts between the NLRA

and the immigration laws, the D.C. Circuit dodged the issue, stating, "we need not resolve these policy questions, for it is the Board that possesses expertise in this area and it is to the Board that we owe deference." 237 F.3d at 647. According to the court, the Board resolved the policy question by granting backpay to Castro because, in the Board's view, denying undocumented workers remedies for retaliation would chill participation in union activities. *Id.* at 648. The D.C. Circuit then deferred to this position because, in the majority's opinion, "Hoffman provide[d] no reason for believing that the Board's position on this issue represents an unreasonable interpretation of the NLRA." *Id.*

The Board was not entitled to the court's deference, however. Because the Board has no authority to interpret or apply the immigration laws, its decisions regarding such issues are entitled to no deference whatsoever. *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1393 n.3 (9th Cir. 1986), *cert. denied*, 484 U.S. 985 (1987). The question before the D.C. Circuit was not whether the Board's position represented a "reasonable interpretation" of the NLRA, but whether the Board's remedy avoided a potential conflict with the immigration laws. *Sure-Tan*, 467 U.S. at 903; *see also, NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 59-60 (2d Cir. 1997) (J. Jacobs, dissenting) (rejecting the majority's view that the Board reconciled the NLRA and IRCA in a "reasonable way" as too deferential a standard and stating that "the proper question is whether the Board's remedy is tailored to avoid any conflict between the NLRA and the requirements of another federal legislative scheme."). Because the Board's remedy created a real conflict between the labor laws and the immigration laws, the D.C. Circuit should have reversed the Board's backpay award.

C. The D.C. Circuit Erred by Failing to Resolve the Conflict Between the NLRA and the Immigration Laws Created by the NLRB's Improper Backpay Award To Castro

By improperly deferring to the Board, the D.C. Circuit preserved the conflict between the labor laws and the immigration laws that the Board created by awarding backpay to Castro. Instead of resolving this conflict, the D.C. Circuit overlooked it, stating that nothing in IRCA expressly prohibits an award of backpay to an undocumented worker. 237 F.3d at 646. What the D.C. Circuit disregarded, however, is that the immigration laws made Castro's employment unlawful.

The INA makes the unauthorized entry into this country illegal. 8 U.S.C. § 1325(a). IRCA makes it illegal for employers to hire undocumented workers. 8 U.S.C. §1324a. Further, IRCA strives to control illegal immigration by making it illegal for undocumented aliens to obtain employment through the use of fraudulent immigration documents. 18 U.S.C. § 1546; 8 U.S.C. § 1324c. Castro violated these immigration laws by unlawfully entering this country and by presenting Hoffman with fraudulent immigration documents to prevent the detection of his illegal status, which would have precluded his lawful employment. The Board and the D.C. Circuit acknowledge that undocumented aliens who leave this country, as they should, may be deprived of backpay. However, the Board and the D.C. Circuit contend that those undocumented aliens, like Castro, who illegally remain in this country are somehow entitled to more preferential treatment in the form of backpay. This decision creates a perverse set of incentives. It rewards illegal entry, rewards the use of fraudulent immigration documents, penalizes voluntary departure from

the country, and encourages undocumented aliens to extend their illegal stay. In this case, the Board's award of backpay to Castro also had the unfortunate effect of either: (1) excusing Castro's failure to mitigate[10] his damages because he could not legally obtain employment; or (2) sanctioning the perpetration of a fraud by Castro on yet another unsuspecting employer to satisfy his mitigation obligation.

As demonstrated, instead of fairly considering the policies of the immigration laws, the Board completely disregarded them by awarding backpay to Castro. And, by approving the Board's improper backpay award, the D.C. Circuit "solicitously preserve[d] and reinforce[d] the economic incentives for employers to comply with the labor laws, but d[id] so without full appreciation of or equal effort to promote the economic incentives to obey the immigration laws[; t]hus [allowing] the labor law dog [to] wag[] the immigration law tail." *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d at 60 (J. Jacobs, dissenting).

The D.C. Circuit defends its action by pointing to IRCA's legislative history, which the majority contends offers support for the Board's backpay award. This legislative history, a House Judiciary Committee report, states that IRCA's employer sanctions provisions are not intended to:

> "be used to undermine or diminish in any way labor protections in existing

[10] To obtain an award of backpay for a violation of the NLRA, an employee must mitigate his damages by obtaining comparable employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198-200 (1941); *Tubari, Ltd. v. NLRB*, 959 F.2d 451, 453-54 (3rd Cir. 1992).

law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term 'employee' in Section 2(3) of the [NLRA], as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), application of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.'"

H.R. Rep. 99-682, pt.1, at 58 (1986), *reprinted in* 6 U.S.S.C.A.N. 5649, 5662.

As this Court held in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) (superceded on other grounds by statute), where the language of a statute is clear, "we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *See also, Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 1311 (2001) ("Legislative history is problematic even when the

attempt is to draw inferences from the intent of duly appointed committees of the Congress."). Nothing about IRCA's application to this case is ambiguous and, therefore, there is no need to consult IRCA's legislative history.

Additionally, even if the legislative statement referenced by the majority were relevant, this statement falls far short of delivering any sort of backpay guarantee. As the Seventh Circuit found in *Del Rey Tortilleria v. NLRB*:

> "th[is] Committee Report merely endorses the first holding of *Sure-Tan* that undocumented aliens are employees within the meaning of the NLRA. The Committee did not disapprove of the part of the decision holding that undocumented aliens are entitled to receive backpay only for those periods when they are lawfully entitled to be present and employed in the United States. The Committee's preference that existing law be preserved can be read as support for the remedial holding of *Sure-Tan*. We do not believe that Congress, in passing IRCA, expressed its dissatisfaction with *Sure-Tan's* remedial holding."

976 F.2d at 1121.

Under IRCA, it is beyond dispute that the employment of an undocumented alien is illegal. It also is beyond dispute that an undocumented worker who furnishes a fraudulent immigration document to obtain

employment has committed a criminal act. Such undocumented workers are not "lawfully available for employment" and, thus, not eligible for an award of backpay. By holding otherwise, the D.C. Circuit created a direct conflict between the immigration laws and the NLRA. Reversal by this Court is required to resolve the conflict.

CONCLUSION

In *Sure-Tan*, this Court stated that backpay must be "tolled" during "any period when the undocumented worker [is] not lawfully entitled to be legally present and employed in the United States." At no time during the backpay period elucidated by the NLRB in this case was Jose Castro ever legally present in the United States or legally entitled to work in this country. Accordingly, under *Sure-Tan*, Castro was entitled to no backpay.

The D.C. Circuit erred in approving the Board's backpay order for Castro. The D.C. Circuit's approval of the backpay award disregards this Court's holding in *Sure-Tan* and conflicts with this country's immigration laws. For all of the reasons stated herein, Hoffman respectfully requests that this Court reverse the decision of the D.C. Circuit and deny backpay to Jose Castro.

Respectfully submitted,

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29 U.S.C. § 160. Prevention of unfair labor practices

....

(c) Reduction of testimony to writing; findings and orders of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No

order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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In the Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether an order of the National Labor Relations Board directing petitioner to pay back pay to an employee who was discriminatorily laid off for union-organizing activity in violation of Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3), but only up to the date on which petitioner discovered that the employee was an undocumented alien not authorized to be employed in the United States, is a proper exercise of the Board's authority to remedy petitioner's violation of Section 8(a)(3) of the Act.

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In the Supreme Court of the United States

No. 00-1595

HOFFMAN PLASTIC COMPOUNDS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-36a) is reported at 237 F.3d 639. The prior opinion of the court of appeals panel (Pet. App. 37a-77a) is reported at 208 F.3d 229. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 78a-87a) and the decision of the administrative law judge (Pet. App. 88a-95a) are reported at 326 N.L.R.B. 1060. Prior decisions and orders of the Board are reported at 314 N.L.R.B. 683 and 306 N.L.R.B. 100.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 16, 2001. The petition for a writ of certiorari was filed on April 16, 2001, and was granted on September 25,

2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 8(a)(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under Section 8(a)(3), "if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice." *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 398 (1983). Section 10(c) of the Act authorizes the National Labor Relations Board (Board) to order, as a remedy for a violation of Section 8(a)(3), that the employer "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay." 29 U.S.C. 160(c). Awards of back pay have historically been a core part of the Board's remedial authority under the Act. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969) (discussing importance of back pay remedy); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347 (1953) (noting that the Board has provided for back pay from its "very first published order"); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-200 (1941).

b. In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court held, in agreement with the Board, that an alien not lawfully present in the United States is entitled to the protections of the NLRA as an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). See *Sure-Tan*, 467 U.S. at 891-894. The Court also sustained the Board's ruling in that case that the employer had violated Section 8(a)(3) of the Act when it constructively discharged its undocumented alien workers by reporting them to the Immigration and Naturalization Service (INS), which resulted in the employees' arrest and immediate voluntary departure from the United States to Mexico in lieu of deportation. See 467 U.S. at 886-888, 898-906.

As a remedy for the violation in the *Sure-Tan* case, the Board had "ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902.[1] The court of appeals modified the Board's remedial order to require reinstatement "only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement," and to deny back pay to discriminatees "unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *NLRB* v. *Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982), rev'd in part, 467 U.S. 883 (1984); see also 467 U.S. at 889. The court of appeals observed, however, that the discriminatees might not have been lawfully available for employment in the United States before the new offers of reinstatement were extended, and thus might receive no back pay at all. 672 F.2d at 606. To avoid such a situation, the court of appeals directed that the alien employees who had left the United States be awarded a minimum of six months' back pay, reasoning that was "the minimum during which the discriminatees might reasonably have remained

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[1] The Board in *Sure-Tan* declined to adopt the suggestion of an administrative law judge that the undocumented alien employees be afforded a minimum of four weeks' back pay, and instead directed that the compliance proceedings determine whether "the employees had in fact been available for work" for any period in which back pay might be awarded. 467 U.S. at 889.

employed without apprehension by INS, but for the employer's unfair labor practice." *Ibid.*

This Court held that the minimum six-month back pay award imposed by the court of appeals "constitute[d] pure speculation and [did] not comport with the general reparative policies of the NLRA." *Sure-Tan*, 467 U.S. at 901. As the Court explained, such an order departed from the requirement that a remedy "be adapted to the situation which calls for redress." *Id.* at 900. The Court agreed with the court of appeals, however, that "the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States." *Id.* at 902-903. That condition on the discriminatees' remedy, the Court stated, was appropriate to accommodate "the objective of deterring unauthorized immigration" reflected in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 467 U.S. at 903.[2] The Court added (*ibid.*):

> By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

c. Subsequent to *Sure-Tan*, Congress amended the INA by enacting the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In a substantial

[2] The Court observed that, under the version of the INA then in effect, "[t]he central concern of the INA [was] with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," and the INA reflected at most "a peripheral concern with employment of illegal entrants." *Sure-Tan*, 467 U.S. at 892 (internal quotation marks omitted).

change from prior law (see note 2, *supra*), IRCA made it unlawful for employers knowingly to employ aliens not authorized to obtain employment in the United States. Congress provided in IRCA that "[i]t is unlawful for a person or other entity—(A) to hire * * * for employment in the United States an alien knowing the alien is an unauthorized alien * * * or (B) to hire for employment in the United States an individual without complying with the requirements of subsection (b)." 8 U.S.C. 1324a(a)(1).[3] "[T]he requirements of subsection (b)" referred to in Section 1324a(a)(1)(B) are set forth in Section 1324a(b), which establishes an "employment verification system" that obligates each employer to examine specified kinds of documents to verify that a person whom it wishes to hire is not an "unauthorized alien." 8 U.S.C. 1324a(b). In addition, Section 1324a(a)(2) of Title 8, as added by IRCA, makes it unlawful for a person, after hiring an alien for employment in accordance with paragraph (1) (*i.e.*, Section 1324a(a)(1)), "to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." 8 U.S.C. 1324a(a)(2).

An employer who violates Section 1324a may be subject to civil and criminal penalties. See 8 U.S.C. 1324a(e)(4) and (5) (civil penalties); 8 U.S.C. 1324a(f)(1) (criminal penalties). Any penalties apply, however, only if the employer has knowingly hired or retained an unauthorized alien or has not complied with the employment verification system.[4]

[3] IRCA defines "unauthorized alien" to mean, "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. 1324a(h)(3).

[4] An employer that violates IRCA's prohibition against knowingly hiring or continuing to employ an unauthorized alien is subject to an escalating range of civil penalties from $275 to $11,000. See 8 U.S.C.

In addition to placing new restrictions on the hiring practices of employers, IRCA also prohibited certain conduct by individuals seeking employment. Under 18 U.S.C. 1546(b), as amended by IRCA, it is a criminal offense for a person to use "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] * * * that the document is false, * * * for the purpose of satisfying a requirement of" the employment verification system established by Section 1324a(b). See 18 U.S.C. 1546(b)(1) and (2).

2. Following the Court's decision in *Sure-Tan* and the enactment of IRCA, the Board considered in several cases whether undocumented alien workers who had not departed from the United States remained eligible for the remedies of reinstatement or back pay.[5] Most extensively, in *A.P.R.A.*

1324a(e)(4)(A); 8 C.F.R. 274a.10(b)(1). An employer that engages in a "pattern or practice" of violations is subject to a criminal fine of not more than $3000 for each such violation, and to imprisonment not to exceed six months "for the entire pattern or practice." 8 U.S.C. 1324a(f)(1). An employer that violates IRCA's prohibition against hiring an individual without complying with the "employment verification system" (see 8 U.S.C. 1324a(a)(1)(B), 1324a(b)) is subject only to a civil penalty, ranging from $110 to $1100 per violation. 8 U.S.C. 1324a(e)(5); 8 C.F.R. 274a.10(b)(2).

[5] Initially, the Board interpreted *Sure-Tan*'s rule requiring the tolling of any back pay period as applying to all undocumented alien workers, whether or not they remained in the United States during the back pay period. See *Felbro, Inc.*, 274 N.L.R.B. 1268, 1269 (1985), enf. denied, 795 F.2d 705 (9th Cir. 1986). The Ninth Circuit rejected the Board's reading of *Sure-Tan* and concluded that *Sure-Tan* "barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers." *Local 512, Warehouse & Office Workers' Union* v. *NLRB (Felbro, Inc.)*, 795 F.2d 705, 722 (1986). The Board subsequently reexamined the issue in light of the Ninth Circuit's decision and adopted that court's reading of *Sure-Tan*. See *Del Rey Tortilleria, Inc.*, 302 N.L.R.B. 216, 219-220 (1991), enf. denied, 976 F.2d 1115 (7th Cir. 1992). The Board has since adhered to the *Felbro* court's reading of *Sure-Tan*. See *A.P.R.A. Fuel Oil Buyers*

Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408 (1995), enf'd, 134 F.3d 50 (2d Cir. 1997), the Board considered the situation of an employer who had knowingly hired undocumented workers in violation of IRCA, and then discharged them for union activities in violation of Section 8(a)(3) of the NLRA. Seeking to accommodate the policies of both the NLRA and IRCA, the Board concluded that a limited award of back pay and a conditional order of reinstatement would effectuate the policies of the NLRA by affording the alien workers meaningful redress for the violation of that Act, without requiring the reestablishment of an employment relationship in violation of IRCA. See *A.P.R.A. Fuel*, 320 N.L.R.B. at 415-416.[6] As the Board explained, the fired employees "would have retained their jobs with [the employer] but for their union activities and the [employer's] unlawful retaliation for them." *Id.* at 416. And the Board stressed that, unlike the situation in *Sure-Tan*, "in which [this] Court sought to avoid sponsoring a violation of the INA by encouraging the employees to reenter the country illegally," an appropriately limited award of back pay to an undocumented alien who has never left the United States "does not promote illegal reentry" and also does not "induce [the employer] to illegally rehire the discriminatees in order to terminate backpay liability." *Ibid.* Rather, the Board noted, "the

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Group, Inc., 320 N.L.R.B. 408, 415 (1995), enf'd, 134 F.3d 50 (2d Cir. 1997); Pet. App. 83a n.8.

[6] The remedy of reinstatement under *A.P.R.A. Fuel* is available to discharged employees only upon "their satisfaction of the normal verification of eligibility requirements prescribed by IRCA." 320 N.L.R.B. at 415. The back pay period under *A.P.R.A. Fuel* terminates when the alien employees are reinstated, "subject to compliance with the [employer's] normal obligations under IRCA" to verify their eligibility for employment in the United States, or when the employees, after a reasonable period of time, fail to produce "the documents enabling the [employer] to meet its obligations under IRCA," whichever date is earlier. *Id.* at 416.

backpay remedy serves to place the employees for a limited time in the position that they would have been but for the [employer's] unlawful conduct." *Ibid.*

The Board in *A.P.R.A. Fuel* indicated, moreover, that in light of the policies of IRCA, it would not order reinstatement in a case where the employer did *not* know, at the time of hire, that the employee whom it subsequently discharged in violation of the NLRA was not authorized to work in the United States under IRCA, but rather learned of that fact only after the discharge. See *A.P.R.A. Fuel*, 320 N.L.R.B. at 415 n.39, 416 n.44. As the Board noted, under established Board law, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct." *Id.* at 416 n.44 (internal quotation marks and citations omitted). Thus, an employer who hires an employee in conformity with IRCA's employment-verification system and believes in good faith that the employee is authorized to work in the United States, but who subsequently learns that the employee is an undocumented alien not authorized for employment, may take advantage of this after-acquired evidence rule to terminate its liability for back pay and to avoid reinstatement altogether, even if it has discharged the employee in violation of Section 8(a)(3) of the NLRA.

3. a. Petitioner produces polyvinyl chloride pellets. In May 1988, petitioner hired Jose Castro to work as a compounder in petitioner's plant. Pet. App. 40a; *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 101, 104 (1992). Prior to hiring Castro, petitioner, as required by IRCA (see p. 5, *supra*), examined documents tendered by Castro to verify that he was authorized to work in the United States.

Those documents appeared to be genuine and related to the person presenting them. Pet. App. 85a & n.11.

Later in 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO, began a union-organizing campaign at petitioner's plant. Castro supported the organizing campaign and distributed authorization cards to co-workers. Pet. App. 5a; *Hoffman Plastic Compounds*, 306 N.L.R.B. at 102, 108. On January 31, 1989, petitioner laid off Castro and all of the other employees who had engaged in organizing activities. Pet. App. 5a.

b. On January 22, 1992, the Board issued a decision finding that petitioner had unlawfully responded to the union's organizing campaign by discriminatorily selecting Castro and three other employees for layoff "in order to rid itself of known union supporters," contrary to Section 8(a)(3) of the NLRA. *Hoffman Plastic Compounds*, 306 N.L.R.B. at 100; see also *id.* at 100 n.1 (finding that Castro "had sufficient seniority * * * that he would not have been laid off but for [petitioner's] discrimination against him"); Pet. App. 5a, 79a. The Board ordered petitioner, *inter alia*, to offer reinstatement to Castro and the other discriminatees, and to make them whole for lost earnings, with the amount to be determined at a compliance hearing before an administrative law judge (ALJ). *Hoffman Plastic Compounds*, 306 N.L.R.B. at 100, 107; Pet. App. 5a, 79a. Thereafter, petitioner entered into a stipulation with the Board's General Counsel, whereby petitioner waived its right to seek judicial review of the Board's January 22, 1992, decision and order. Pet. App. 88a.

c. The parties then proceeded to the compliance hearing before the ALJ. On June 14, 1993, the final day of the hearing, Castro testified that he was born in Mexico and that, to obtain employment with petitioner in 1988, he had tendered a birth certificate that "is not his own," but rather "is for an individual born in El Paso, Texas." Pet. App. 80a. He further testified, "[T]he birth certificate was loaned to me so

that I can secure a job." *Ibid.* Based on Castro's testimony, the ALJ recommended that Castro be denied reinstatement and awarded no back pay. *Id.* at 94a-95a.

On September 23, 1998, the Board reversed the ALJ's decision in part. Pet. App. 78a-87a. Relying on its decision in *A.P.R.A. Fuel*, the Board rejected petitioner's contention that *Sure-Tan* and IRCA bar any award of back pay to Castro in light of his testimony before the ALJ. *Id.* at 84a. The Board found, however, that petitioner had "attempted to comply with IRCA when it hired Castro," that it "would not have offered Castro initial employment had it known of his unauthorized immigration status," and that it "did not learn until the back-pay hearing that Castro used fraudulent identification in applying for employment." *Ibid.* Applying the "after-acquired knowledge" rule adverted to in *A.P.R.A. Fuel* (see p. 8, *supra*), the Board concluded that "Castro is not entitled to reinstatement, and backpay shall terminate on June 14, 1993, the date [petitioner] learned that Castro used fraudulent identification to gain employment." *Id.* at 85a.[7] A dissenting Board Member would have denied Castro all back pay. *Id.* at 87a.

[7] The Board generally defines the back pay period as commencing on the date of the discharge (or other discriminatory action) and ending on the date on which the employer extends the employee a proper offer of reinstatement. See *Seven-Up Bottling*, 344 U.S. at 347; *F.W. Woolworth Co.*, 90 N.L.R.B. 286, 292-298 (1950). In this case, petitioner attempted to make Castro an offer of reinstatement on March 10, 1989, before the Board's decision of January 22, 1992, finding petitioner in violation of the NLRA and ordering relief. See Pet. App. 80a. Petitioner's offer of reinstatement, however, did not toll its back pay liability to Castro because, the Board found, that offer was not "specific, unequivocal, and unconditional." *Id.* at 81a. Petitioner did not challenge that finding by the Board in the court of appeals. The Board awarded Castro $66,951 (plus interest). It found that Castro had satisfied his obligation to mitigate his damages by obtaining interim work. *Id.* at 85a & n.12.

4. Petitioner filed a petition for review of the Board's order in the court of appeals. A panel of the court of appeals denied the petition for review. Pet. App. 37a-77a. After rehearing the case en banc, the court again denied the petition for review and enforced the Board's order. *Id.* at 1a-36a.

The en banc court rejected petitioner's contention that *Sure-Tan* prohibits the Board from awarding any back pay to Castro. Pet. App. 7a. That contention, the court noted, is based on "a single sentence from *Sure-Tan*," but "[r]ead in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees." *Ibid.*[8] The court explained that to construe that passage as establishing an absolute bar to back pay "would conflict with the Court's holding [in *Sure-Tan*] that an undocumented discriminatee is entitled to backpay so long as it is appropriately tailored to the discriminatee's actual loss." *Id.* at 8a. The court further observed that the restriction set forth in the sentence at issue had been fashioned by the Seventh Circuit, and was adopted by this Court "to ensure that the *Sure-Tan* discriminatees who had left the country would not reenter illegally to claim backpay." *Id.* at 11a.

The court also rejected petitioner's alternative contention that, "even if *Sure-Tan* does not bar backpay to undocumented discriminatees, IRCA does." Pet. App. 14a. The court explained that "IRCA neither amends nor repeals the NLRA or any other labor law," and "IRCA's legislative history * * * shows that Congress did not intend the statute to limit the NLRA even indirectly." *Ibid.* And it

[8] The relevant sentence reads: "[I]n computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Sure-Tan*, 467 U.S. at 903. See also p. 4, *supra*.

rejected petitioner's contention that, even "[a]bsent a statutory bar * * * the Board's backpay award fails to accommodate IRCA's goal of limiting the hiring of undocumented workers." *Id.* at 16a. As the court explained:

> The Board crafted the limited backpay remedy to avoid conflict with IRCA and to implement its understanding of the purposes of both IRCA and the NLRA. According to the Board, the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA's goal), reinforces collective bargaining rights for all workers (the NLRA's goal), and protects wages and working conditions for authorized workers (the goal of both Acts).

Id. at 23a.[9]

SUMMARY OF ARGUMENT

The National Labor Relations Board acted reasonably and within its authority in ordering a limited award of back pay to Jose Castro as a remedy for petitioner's violation of Section 8(a)(3) of the National Labor Relations Act (NLRA). Contrary to petitioner's contentions, that back pay award, which terminates as of the date that petitioner learned that Castro was an undocumented alien and therefore could not

[9] Judge Sentelle, joined by Judges Henderson and Randolph, dissented. Pet. App. 24a-36a. Judge Sentelle would have ruled that *Sure-Tan* "definitively answered" the question before the court and would have required vacatur of the Board's back pay award to Castro. *Id.* at 27a. He also believed that the majority "essentially ignore[d]" the "statutory directives of IRCA," and improperly "cho[se] to mediate between [the] statutory 'goals' " of IRCA and the NLRA. *Id.* at 35a. Judge Ginsburg, in a separate dissenting opinion, agreed with Judge Sentelle that *Sure-Tan* "definitively answered the question" before the court, and therefore found it unnecessary "to reach the question whether the Board reasonably reconciled the remedial scheme of the NLRA with the policies embodied in the IRCA." *Id.* at 36a.

be employed because of the Immigration Reform and Control Act of 1986 (IRCA), does not contravene either this Court's decision in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), or IRCA. The award also accommodates and indeed furthers the policies underlying IRCA, and it represents an otherwise proper exercise of the Board's authority to remedy violations of Section 8(a)(3). The back pay award should therefore be upheld.

A. *Sure-Tan* does not hold that the Board is flatly prohibited in all circumstances from awarding back pay as a remedy to an undocumented alien whose rights under the NLRA have been violated. *Sure-Tan* involved undocumented aliens who were reported to the INS by their employer in retaliation for exercising their rights under the NLRA, were taken into custody by the INS, and immediately left the United States. The Court held that a minimum award of six months' back pay to the aliens ordered by the court of appeals was impermissibly speculative, and that although the aliens might be entitled to receive back pay, any such back pay had to be tolled until the aliens demonstrated that they were legally authorized to be present and employed in the United States. The Court perceived that the tolling period was necessary to accommodate the objective embodied in the Nation's immigration laws of deterring unauthorized entry into the United States.

This case, however, differs markedly from *Sure-Tan* in that the discriminatee did not leave the United States labor market, and there is no need to speculate about the period that the discriminatee would have worked for the employer, had the employer not violated the NLRA. Because Castro did not leave the United States, the Board's back pay award does not present the same danger, perceived by the Court in *Sure-Tan*, of encouraging aliens to reenter this country illegally. Furthermore, because petitioner reasonably believed that Castro was authorized for employment when it hired

him, its continued employment of Castro (until it learned he was an undocumented alien) was not prohibited by IRCA. The Board's back pay award also terminated as of the date that petitioner learned it could no longer employ Castro, and the Board did not order reinstatement. Thus, the Board's back pay award does not encourage employers to violate IRCA by hiring undocumented aliens. Nor does the Board's back pay remedy reflect speculation. To the contrary, it remedies Castro's actual economic loss resulting from petitioner's unfair labor practice, in that it is tied to the period that Castro would have continued to work for petitioner. Although petitioner invokes one sentence in the Court's opinion in *Sure-Tan* to argue that no undocumented alien may receive back pay as a remedy for a violation of the NLRA (and possibly other federal labor laws as well), that broad question was not before the Court in *Sure-Tan*, and the Court need not and should not read that sentence in a manner divorced from its context as petitioner suggests.

B. The Board's order appropriately reconciles the policies of the NLRA and IRCA, and indeed it furthers the purposes underlying IRCA. Back pay is a fundamental aspect of the Board's remedial authority under the NLRA and has long been recognized as essential to effective enforcement of the Act. The Board's award also takes account of Castro's misconduct by denying him reinstatement and terminating his back pay when it became clear that, because he was an undocumented alien, petitioner could and would no longer employ him. The Board's after-acquired knowledge rule, terminating back pay as of that date, is very similar to the approach taken by this Court in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). In addition, the Board's order does not place petitioner into a situation of conflicting obligations. The back pay order does not require petitioner to hire Castro in violation of IRCA, and it runs

only for the time in which petitioner could have employed Castro without violating IRCA.

Appropriately limited back pay for undocumented alien employees who have been subjected to violations of the NLRA promotes enforcement of federal immigration law as well as labor law. Congress, this Court, and the Board have all recognized that employers may have an economic incentive to employ undocumented aliens, because such employees are more willing to work for substandard wages and in subpar working conditions and are unlikely to complain about such wages and conditions in the absence of legal protections. Including undocumented aliens within the protection of federal labor law counteracts that incentive, because it minimizes the danger that employers will obtain a competitive advantage from employing unauthorized workers. If an employer recognizes that it will face the monetary sanction of back pay if it unlawfully discharges an undocumented alien worker in violation of the NLRA, just as if it unlawfully discharged a citizen worker, then it is less likely to perceive an advantage in hiring undocumented aliens. Undocumented aliens in turn will be less likely to seek or obtain employment here.

Based on all these considerations, Congress did not bar undocumented aliens from receiving back pay as a remedy for violations of federal labor laws, and indeed in IRCA it authorized increased enforcement of labor laws by the Department of Labor, in recognition of the fact that such enforcement (including the possibility of back pay awards for undocumented aliens) would deter employment of undocumented aliens and would therefore deter illegal immigration. The flat rule advocated by petitioner, barring undocumented aliens from back pay awards, might therefore undermine effective enforcement of federal immigration and labor laws, and neither *Sure-Tan* nor IRCA requires that result.

ARGUMENT

THE BOARD'S LIMITED AWARD OF BACK PAY IN THIS CASE IS A PROPER EXERCISE OF ITS AUTHORITY TO REMEDY PETITIONER'S VIOLATION OF SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT

The question before the Court in this case is whether the Board acted within its remedial authority in awarding Castro a limited measure of back pay as a remedy for petitioner's violation of the NLRA.[10] Petitioner contends that the Board is precluded from awarding Castro *any* back pay by *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), and by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. That contention is incorrect. The passage from *Sure-Tan* on which petitioner relies, understood in light of its context, does not bar the remedy ordered by the Board in this case. Further, the Board's limited back pay order appropriately effectuates the remedial purposes of the NLRA and accommodates the prohibitions against employment of undocumented aliens in IRCA. Accordingly, the Court should uphold the Board's award of back pay to Castro.

[10] Petitioner has not challenged in this Court the Board's determination that it engaged in an unfair labor practice by discriminatorily laying off Castro in violation of Section 8(a)(3) of the NLRA. See Pet. App. 88a.

A. This Court's Decision In *Sure-Tan* Does Not Preclude Appropriately Limited Back Pay For Undocumented Alien Employees Discharged In Violation of Section 8(a)(3) Who Are Physically Present In The United States During The Back Pay Period.

1. Petitioner principally contends that the Court's decision in *Sure-Tan* conclusively prohibits any award of back pay to an undocumented alien who is not authorized to work in the United States. Pet. Br. 7-20. That argument is based on one sentence in the *Sure-Tan* opinion, in which the Court stated that, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903. Based on that sentence, petitioner argues (Br. 20) that Castro is not entitled to any back pay because he "never was lawfully present during the backpay period and he never was lawfully entitled to work during the backpay period."

As the court of appeals observed (Pet. App. 7a), however, the sentence from *Sure-Tan* upon which petitioner relies would support a conclusion that Castro is not entitled to any back pay only if that sentence is "divorced from *Sure-Tan*'s factual and legal context." In its context, the *Sure-Tan* sentence applies specifically to those undocumented workers who left the United States during the relevant back pay period, and not to employees like Castro, who did not. See Pet. App. 7a-13a.

a. *Sure-Tan* involved undocumented alien employees who were reported by their employer to the INS in retaliation for pro-union activities and who were immediately arrested by INS and granted voluntary departure (in lieu of deportation) from the United States. 467 U.S. at 886-888; see pp. 2-3, *supra*. No evidence in the record indicated

whether the employees had returned to the United States, with or without authorization. The ALJ nevertheless had declined to order any back pay based on a finding that the deported employees were "physically unavailable for work." The Board, noting the absence of evidence on that point, remitted the issue of the employees' availability for work to a compliance hearing. See *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1187, 1193 (1978).

On the NLRB's petition for enforcement, the Seventh Circuit limited in some respects and expanded in other respects the remedy ordered by the Board. *NLRB* v. *Sure-Tan, Inc.*, 672 F.2d 604-606. In particular, the Seventh Circuit expressed concern that the undocumented alien employees "might be motivated to reenter the United States unlawfully to claim reinstatement and backpay," and determined that the Board's remedial order required modification to avoid such an incentive. *Id.* at 603. The court therefore modified the Board's remedial order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement." *Id.* at 606. The court further concluded that, "[c]onsistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States," it was appropriate for the court to "modify the Board's order so as to make clear * * * that * * * in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Ibid.* That statement was the genesis of the proposition ultimately adopted by this Court in respect to back pay awards for undocumented workers. See *Sure-Tan*, 467 U.S. at 903.

The court of appeals also observed in *Sure-Tan*, however, that "[i]n the circumstances of this case it may well be that the discriminatees will not have been lawfully available for

employment in the United States prior to the date of the new offers of reinstatement which will be required," and that "[i]n that event, the discriminatees will receive no backpay." 672 F.2d at 606. Concluding that such a result would be inconsistent with remedial principles of the NLRA, the court ordered the Board to fix a minimum award of six months' back pay for the discriminatees, which the court estimated to be the length of time during which the employees "might reasonably have remained employed without apprehension by INS," had Sure-Tan not reported them to the INS in retaliation for their protected union activity, contrary to the NLRA. *Ibid.*

b. This Court reversed the minimum six months' award of back pay that the court of appeals had ordered, on the ground that such an award would not be "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Sure-Tan*, 467 U.S. at 901. The Court faulted the court of appeals for "'estimat[ing]' an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence." *Id.* at 902 n.11. The Court did not accept the employer's argument (see Pet. Br. at 19-23, *Sure-Tan, Inc.* v. *NLRB*, *supra* (No. 82-945)) that, as a matter of law, *any* back pay award for the benefit of the discriminatees would be contrary to federal immigration law. Rather, the Court "generally approve[d] the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement *with backpay*, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902 (emphasis added).

The Court also recognized, however, that the discriminatees had left the United States, perhaps without

authorization to return and obtain employment. The Court therefore concluded that implementation of "the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal *readmittance* to the United States," to accommodate "the objective of deterring unauthorized immigration that is embodied" in the INA. *Sure-Tan*, 467 U.S. at 902-903 (emphasis added). As the Court explained, "[b]y conditioning the offers of reinstatement on the employees' legal *reentry*, a potential conflict with the INA is thus avoided." *Id.* at 903 (emphasis added). And, like the court of appeals, the Court added the proviso that, "[s]imilarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." *Ibid.*

c. The opinions of the Board, the court of appeals, and this Court in *Sure-Tan* make clear that the central remedial problem in that case resulted from the fact that, on the very first day of the back pay period (the date of the constructive discharge), all of the discriminatees departed from the United States. See 467 U.S. at 887. By that departure, those workers removed themselves from the United States labor market, under circumstances where they were prohibited by law from reentering that labor market without authorization from federal immigration authorities. Under standard principles of employment law, workers who are "unavailable" for work are ineligible for back pay during the period of their absence from the labor market.[11] Indeed, the

[11] For example, periods that an employee is "unavailable" for work because of illness or disability are excluded in computing a back pay award (unless the condition was caused by the employer's unlawful conduct). See 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1810-1811 (3d ed. 1996); see also *Miller* v. *Marsh*, 766 F.2d 490, 492 (11th Cir. 1985) (no back pay for employee who removed herself from job market by entering law school full-time).

workers in *Sure-Tan* were similarly situated to employees who are incarcerated or who are inducted into the armed forces after having been discharged in violation of the NLRA, and who (the Board has held) may not receive back pay during the period of their incarceration or military service, because they are unavailable for work during that period and could not physically enter the labor market without breaking the law.[12] And because the record did not

[12] See *Sure-Tan*, 467 U.S. at 903 (citing to NLRB's case handling manual, which discussed, where cited, grounds on which employees might be unavailable and therefore ineligible for back pay, including illness, attendance at school, confinement in institutions, and service in armed forces); 234 N.L.R.B. at 1198 nn.11 & 12 (ALJ's order in *Sure-Tan* denying back pay, relying on these analogies); see also *Lundy Packing Co.*, 286 N.L.R.B. 141, 163 (1987) (incarceration), enf'd, 856 F.2d 627 (4th Cir. 1988); *MSW Constr., Inc.*, 219 N.L.R.B. 1073, 1079 (1975) (same); *Gifford-Hill & Co., Inc.*, 188 N.L.R.B. 337, 338 (1971) (same); *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1028 (1953) (same); *John David Brock*, 42 N.L.R.B. 457, 468-469 (1942) (induction).

By contrast, the Board has awarded back pay to discriminatees who lacked certain legal qualifications to obtain employment, but who were not physically barred from the labor market without legal authorization. See *Felbro*, 795 F.2d at 718 (discussing cases); see also *NLRB* v. *IBEW Local Union 112*, 992 F.2d 990, 995 (9th Cir. 1993) (permitting award of back pay to discriminatee who did not have journeyman electrician's license necessary to perform work); *NLRB* v. *Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) (modifying Board's award of back pay to permit award to discriminatee whose driver's license was suspended, during periods in which other unlicensed drivers were also employed); *Justrite Mfg. Co.*, 238 N.L.R.B. 57, 67-68 (1978) (underage worker entitled to back pay); *Robinson Freight Lines*, 129 N.L.R.B. 1040, 1042, 1047-1048 (1960) (truck driver without valid driver's license awarded back pay up to date on which he was laid off by employer for that reason). But see *NLRB* v. *Browne*, 890 F.2d 605, 608-609 (2d Cir. 1989) (reversing Board award of back pay at "driver's rate" to discriminatee whose driver's license had been suspended).

show that those aliens were available for work in the United States for any period after their departure, there was no basis in the record for the court of appeals' speculation that they would have likely remained in Sure-Tan's employment for six more months, had the employer not reported their unlawful presence in the United States to the INS.

Thus, the principal thrust of the Court's ruling on back pay as a remedy in *Sure-Tan* was to set aside the speculative award ordered by the court of appeals as inconsistent with the proper standard governing judicial review of Board remedial orders. See *Sure-Tan*, 467 U.S. at 898 ("We find that the Court of Appeals exceeded its narrow scope of review in imposing both these modifications.") (referring to six months' back pay and various requirements governing the reinstatement offers). Indeed, the Court "generally approved the Board's original course of action" in that case, which was to order back pay, remitting the amount to be calculated at a compliance hearing, at which the employees' availability for work would be considered. See *id.* at 902. The Court did not have before it for review any remedial order of the Board in which *the Board*, taking into account the policies of both the NLRA and the INA, had determined that the discriminatees should receive the traditional compensatory remedy of back pay for a specific period, based on particularized evidence about the employee's employment history following his discharge.[13] Rather, the Court criticized the *court of appeals*, not the Board, for

[13] See *Sure-Tan*, 467 U.S. at 901 n.11 (noting that the Board had never before "attempted to impose a minimum backpay award that the employer must pay regardless of the actual evidence as to such issues as an employee's availability for work or his efforts to secure comparable interim employment"). Indeed, the ALJ in *Sure-Tan* had invited the Board to consider ordering a minimum period of back pay, even in the absence of evidence about the discriminatees' presence in the national labor market, see 234 N.L.R.B. at 1193, but the Board declined to take that course.

ordering back pay "without regard to the employees' actual economic losses or legal availability for work," characterizing the court of appeals' action as "plainly exceed[ing] its limited authority under the Act." *Id.* at 904-905.

The Court also recognized that, after the discriminatees left the United States, they might subsequently have become "available" for work by reentering the United States. See *Sure-Tan*, 467 U.S. at 903-904. To preclude the discriminatees in *Sure-Tan* from claiming that they had reestablished their "availability" for work by reentering the country (illegally) during the back pay period, and to encourage the discriminatees to reenter legally if they wished to render themselves "available" for work, the Court adopted the court of appeals' proviso that the discriminatees must be deemed "unavailable" for work "during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903.

Understood in its context, therefore, the Court's limitation of the back pay remedy available to the workers in *Sure-Tan* should not be understood as a blanket rule barring back pay for undocumented workers in all factual contexts.[14] Certainly the Court was not required in *Sure-Tan* to decide any such broad issue in order to resolve the case before it.

[14] Petitioner suggests (Br. 9) that, in his partial dissent in *Sure-Tan*, Justice Brennan "agreed" that the Court's decision in that case limiting back pay operates broadly to bar back pay for all undocumented workers. That suggestion is unpersuasive. While Justice Brennan expressed concern that, under the majority's decision, undocumented alien workers would be "effectively deprived of any remedy" (467 U.S. at 911), Justice Brennan did not address whether the Court's back pay proviso must necessarily be read as applying to undocumented workers who remain in the United States during the back pay period. In any event, "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974).

Rather, the Court was faced with a specific situation in which the discriminatees, having made themselves unavailable for work by leaving the United States labor market, could not reenter that labor market and become available for work again without either (a) receiving official authorization or (b) breaking the law (by reentering illegally). The Court's decision reflects a concern that a discriminatee who had left the United States should be encouraged to pursue the former, rather than the latter, route to reentering the labor market here.

The Board's limited award of back pay to Castro in this case accordingly does not conflict with *Sure-Tan*. Castro remained in the United States following his unlawful discharge by petitioner, and thus did not make himself unavailable for work by removing himself from the labor market. Awarding Castro limited back pay therefore would not promote his illegal reentry into the United States. Rather, Castro is more similarly situated to other workers who are legally ineligible for employment, such as underage workers or workers without necessary state licenses, but who nonetheless may receive back pay under Board and court precedent. See p. 21 note 12, *supra*. Nor is the factual basis for the back pay award speculative. The record in this case demonstrates that, absent his unlawful layoff on January 31, 1989, Castro would have continued working for petitioner until June 14, 1993, at which point the facts revealed by his testimony before the Board would have required petitioner to discharge him under IRCA. 8 U.S.C. 1324a(a)(2); see p. 41, *infra*.

This Court's own discussion of *Sure-Tan* also reveals that that decision does not flatly preclude all back pay for undocumented workers who have been discharged in violation of the NLRA. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), decided only ten days after the decision in *Sure-Tan*, the Court summarized that decision as follows:

> [I]n *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien's illegal presence in this country. *Retrospective sanctions against the employer may accordingly be imposed by the National Labor Relations Board to further the public policy against unfair labor practices.* But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief—reinstatement and continued employment—that probably would be granted to other victims of similar unfair labor practices.

468 U.S. at 1047-1048 n.4 (emphasis added). The *Lopez-Mendoza* Court's reference to the availability of "[r]etrospective sanctions" under *Sure-Tan*, as distinguished from the "prospective relief" of reinstatement, indicates that *Sure-Tan* does not categorically prohibit the Board from awarding back pay to undocumented aliens.[15]

2. As petitioner recognizes (Br. 12 & n.7), the court of appeals' reading of *Sure-Tan* in this case is consistent with that of the Second and Ninth Circuits, which likewise have read *Sure-Tan*'s restriction on back pay to apply only to undocumented discriminatees who have departed from the United States during the back pay period. See *NLRB* v. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 54 (2d Cir. 1997); *Local 512, Warehouse & Office Workers' Union* v. *NLRB* (*Felbro, Inc.*), 795 F.2d 705, 722 (9th Cir. 1986). Similarly, most courts that have examined the issue have held that

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[15] Similarly, Judge Cudahy, who had written the Seventh Circuit's opinion in *Sure-Tan*, subsequently explained that the "not lawfully entitled to be present and employed in the United States" language first appeared in the Seventh Circuit's opinion, and was addressed only to aliens who had left the country. *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F.2d 1115, 1123-1124 (7th Cir. 1992) (Cudahy, J., dissenting).

Sure-Tan does not preclude an award of back pay under other employment-rights statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to undocumented aliens who have remained in the United States.[16] In addition, many courts have ruled that undocumented aliens may recover lost wages in tort and contract actions. See *Felbro*, 795 F.2d at 718 n.12 (collecting cases).

Petitioner, however, urges the Court to adopt the contrary interpretation of *Sure-Tan* set forth in the majority opinion in *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F.2d 1115 (7th Cir. 1992), and in Judge Beezer's dissenting opinion in *Felbro*. Neither of those opinions, however, provides a persuasive reading of the *Sure-Tan* decision. In *Del Rey Tortilleria*, a majority of a panel of the Seventh Circuit interpreted *Sure-Tan*'s back pay limitation broadly to "bar[] undocumented aliens from receiving backpay." 976 F.2d at 1119. In reaching that conclusion, the *Del Rey Tortilleria* court relied in part on Judge Beezer's dissent in *Felbro* (as does petitioner). See *ibid.*[17] Judge Beezer argued that an undocumented worker "has not been harmed in a legal sense by the deprivation of employment to which he had no

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[16] See *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (pre-IRCA case holding that *Sure-Tan* does not preclude undocumented aliens who were subjected to various discriminatory practices from receiving back pay); *Rios* v. *Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (pre-IRCA Title VII case holding that *Sure-Tan* did not preclude back pay to undocumented alien members of class of black and Hispanic employees); *EEOC* v. *Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991) (holding that, after IRCA, undocumented aliens remain protected by Title VII); *Patel* v. *Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988) (pre-IRCA case holding that undocumented aliens may recover unpaid back wages for violations of FLSA), cert. denied, 489 U.S. 1011 (1989); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (pre-IRCA case holding undocumented alien status irrelevant to coverage of FLSA); *Contreras* v. *Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (undocumented alien may sue for compensatory and punitive damages under anti-retaliation provision of FLSA); *Alvarez* v. *Sanchez*, 482 N.Y.S.2d 184, 185 (App. Div. 1984) (pre-IRCA case holding undocumented alien may maintain action under FLSA). See also Equal Employment Opportunity Commission, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Oct. 26, 1999), *available at* <http://www.eeoc.gov/docs/undoc/html> (also concluding that *Sure-Tan* bars back pay for undocumented aliens "only where, as in *Sure-Tan*, the worker is unavailable for work by virtue of being out of the country"). Cf. *Bevles Co.* v. *Teamsters Local 986*, 791 F.2d 1391, 1393-1394 (9th Cir. 1986) (undocumented alien may recover under labor arbitration agreement), cert. denied, 484 U.S. 985 (1987). But see *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc) (holding that, after IRCA, undocumented alien could not pursue claim of retaliatory failure to hire under Title VII), cert. denied, 525 U.S. 1142 (1999).

Some of those employment-rights statutes may raise additional reasons for awarding back pay that are not present in this case. For example, under the minimum-wage and overtime provisions of the FLSA, 29 U.S.C. 206(a) and 207(a), and under the Equal Pay Act, 29 U.S.C. 206(d), when an employee sues to recover unpaid back wages, the employee is seeking compensation for work that was actually performed, not (as in this case) back pay for work that would have been performed had the employee not been unlawfully discharged. In addition, such FLSA and Equal Pay Act suits usually do not present questions of mitigation of damages, whereas an employee who has been discharged in violation of the NLRA and who seeks back pay through an NLRB award generally must show that he has attempted to mitigate his damages. See p. 10 note 7, *supra*.

[17] The panel in *Del Rey* also suggested that, if undocumented aliens could receive back pay as a remedy for a violation of their rights under the NLRA, they "would be rewarded by the NLRB for entering the United States illegally." 976 F.2d at 1119. Nowhere in *Sure-Tan*, however, did this Court explain the justification for its limitation on back pay in such terms. See 467 U.S. at 902-905. Indeed, that reasoning is in significant tension with this Court's conclusion in *Sure-Tan* that, notwithstanding their having illegally entered the United States, undocumented workers are entitled to the benefit of improved wages and working conditions (*i.e.*, the "rewards") that may flow from collective bargaining under the NLRA. See *id.* at 891-894.

entitlement," and therefore is not entitled to any back pay for a discharge in violation of the NLRA. *Felbro*, 795 F.2d at 725.

But in *Sure-Tan*, this Court *declined* to adopt the view that an undocumented alien worker cannot be "harmed in a legal sense" by a violation of the NLRA because he has no right to employment in the United States. To the contrary, the Court ruled in *Sure-Tan*, in agreement with the Board, that undocumented workers are "employees" within the coverage of the NLRA and thus are entitled to the Act's protection against discharge for engaging in protected union activity. See 467 U.S. at 891-894. The Court stressed that interpreting the NLRA to cover undocumented workers protects not only those individuals but also others who are covered by the NLRA. First, "[i]f undocumented alien employees were excluded from * * * protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." *Id.* at 892.[18] Second, including undocumented aliens within the coverage of the NLRA (and similar laws) ensures that employers do not obtain any financial or competitive advantage in hiring undocumented aliens at substandard wages and conditions of employment, rather than citizens and aliens authorized to work. See *id.* at 893; see also *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (en banc) (Ervin, J., dissenting), cert. denied, 525 U.S. 1142 (1999).

[18] Indeed, if undocumented workers were not included within the coverage of the NLRA, they would likely be intimidated from reporting violations to the authorities, even if those violations affected other workers within the coverage of the Act. See *NLRB* v. *Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring) ("If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices[.]").

In sum, the Board and the court of appeals correctly rejected petitioner's contention that *Sure-Tan* categorically prohibits the Board from awarding back pay in any circumstances to undocumented workers simply because of their undocumented status during the back pay period. Rather, the Board and the court properly read *Sure-Tan* to restrict back pay only for discriminatees who were not physically present in the United States during the back pay period. Because Castro was physically present in the United States during the back pay period, *Sure-Tan* did not preclude the Board from awarding him appropriately limited back pay.

B. The Board's Limited Back Pay Award In This Case Reasonably Accommodates The Policies Of The NLRA and IRCA.

Petitioner also contends (Br. 20-28) that, even if *Sure-Tan* does not preclude the Board from awarding any back pay to Castro, IRCA does, because IRCA barred Castro from obtaining employment in the United States. The Board's award of limited back pay to Castro, however, reasonably reconciles the remedial purposes of the NLRA with the objectives of IRCA.

1. The propriety of the Board's back pay order in this case is governed by three remedial principles. First, back pay is a fundamental aspect of the Board's authority to remedy violations of Section 8(a)(3). "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941); see also *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952). Furthermore, Board back pay orders are not limited to the "correction of private injuries." *Phelps Dodge*, 313 U.S. at 193. An order of back pay also promotes "the

achievement and maintenance of workers' self-organization" (*ibid.*) by making all employees at a particular job site (whether or not they are the actual targets of unfair labor practices) "more confident in the exercise of their statutory rights." *Virginia Elec. & Power Corp.* v. *NLRB*, 319 U.S. 533, 541 (1943); see also *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 185 (1973) (back pay aids in the "prevention of a deterrent effect on the exercise of rights guaranteed employees by [Section] 7 of the Act"). Back pay thus deters employers from reaping a financial advantage from retaliatory discharges of union organizers.[19]

Second, even if an employee has been subjected to unlawful discrimination, the employee's own wrongdoing is relevant "[i]n determining appropriate remedial action." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 361

[19] As amicus Equal Employment Advisory Council points out (Br. 15-16), the Board does not have authority under the NLRA to impose purely punitive sanctions such as fines. See *Republic Steel Co.* v. *NLRB*, 311 U.S. 7, 10 (1940). A back pay order is not punitive, however, merely because one of its functions is to deter employers from engaging in unfair labor practices in violation of the Act. Rather, in a situation like this case, where petitioner hired Castro without knowledge that Castro was an undocumented alien and then also discharged Castro without that knowledge, but with the purpose of retaliating against Castro's exercise of rights under the NLRA, an order of back pay, tied closely to the period that Castro would have worked had petitioner not violated Section 8(a)(3), serves the compensatory function of restoring "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge*, 313 U.S. at 194. By contrast, one of the chief defects of the court of appeals' decision in *Sure-Tan* was that its award of back pay had no connection to any period that the undocumented aliens would in fact have worked had they not suffered discrimination, and therefore did not serve a compensatory function. See *Sure-Tan*, 467 U.S. at 900-901. In that situation, the court of appeals' order was arguably more similar to an impermissible fine for a violation of the NLRA. Cf. *id.* at 905 n.14 (declining to resolve whether court of appeals' minimum back pay order in that case was improperly punitive).

(1995) (decided under Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*). Evidence that an employee has engaged in misconduct sufficiently grave that the employer would be fully justified in discharging or refusing to hire the employee on that ground alone may preclude any reinstatement of the employee. Such misconduct may also terminate the employee's right to back pay as of the date that misconduct came to light, on the ground that the employer would have discharged the employee as of that date anyway. But the Board has also concluded that such misconduct will not necessarily deprive the employee of *all* entitlement to back pay for the period before evidence of the misconduct came to light. Rather, the Board has applied an after-acquired knowledge rule closely similar to that applied by this Court in *McKennon*: if the discriminatee "engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct." *Marshall Durbin Poultry Co.*, 310 N.L.R.B. 68, 70 (1993) (limiting back pay of discriminatee who had engaged in workplace sexual harassment), enf'd in relevant part, 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 N.L.R.B. 856, 856-857 (1990) (limiting back pay of discriminatee who had made false statements on job application). Cf. *McKennon*, 513 U.S. at 362 (applying similar back pay limitation rule under ADEA).

The Board's after-acquired knowledge policy is based on a remedial judgment that, while it is appropriate for a discriminatee to bear the economic consequences of his misconduct, he is nonetheless entitled to limited compensatory relief, because "relieving [the employer] of *all* back pay liability, including that for the period when [the employer] had no knowledge of [the discriminatee's misconduct] and had no lawful reason to fire him, would provide an undue windfall for [the employer]." *John Cuneo, Inc.*, 298 N.L.R.B.

at 856 (emphasis added). This Court reached a similar judgment in *McKennon*. On one hand, the Court recognized that requiring reinstatement and continued back pay after the employer learned of the employee's serious misconduct would unduly infringe upon the employer's rights and prerogatives. 513 U.S. at 362. On the other hand, the Court made clear that "[a]n absolute rule barring any recovery of backpay * * * would undermine" the statutory objectives of preventing unlawful employment discrimination. *Ibid.*

Third, in fashioning a remedy, the Board "may [not] wholly ignore other and equally important Congressional objectives," for, "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). Thus, in a case like this one, involving remedies for violations against undocumented alien employees, the Board's order "is obliged to take into account * * * the objective of deterring unauthorized immigration that is embodied in the INA." *Sure-Tan*, 467 U.S. at 903.

2. The back pay order fashioned by the Board in this case is consistent with the remedial principles articulated above. First, the award furthers the compensatory goals of the NLRA by placing Castro, for an appropriately limited period of time, in the economic position he would have occupied had petitioner not violated his rights under the NLRA. See *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 265 (back pay award proper where "designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act").

Second, by terminating Castro's entitlement to back pay as of June 14, 1993, the Board's order is also consistent with NLRA remedial principles. On that date, petitioner learned that Castro had used false documents in applying for employment in May 1988, to establish that he was authorized to work in the United States. Pet. App. 79a-80a. The Board found that petitioner "would not have offered Castro initial

employment had it known of his unauthorized immigration status." *Id.* at 84a. The Board thus cut off Castro's entitlement to back pay as of June 14, 1993. That termination date is consistent with the remedial principles, recognized by this Court in *McKennon* and the Board in numerous cases, that a discriminatee must bear the economic consequences of his own employment-related misconduct, but that misconduct should not be seized upon to give the employer an "undue windfall" of relief from all monetary liability for its own violation of the NLRA. *John Cuneo, Inc.*, 298 N.L.R.B. at 856.

Third, the Board's order reasonably accommodates IRCA. As we have explained (see pp. 4-6, *supra*), IRCA generally makes it unlawful for an employer to hire or retain an individual knowing that he is an alien not authorized to be employed in the United States, or without complying with the "employment verification system" established by IRCA, which obligates each employer to examine specified kinds of documents to verify that a person whom it wishes to hire is not an "unauthorized alien." Petitioner, however, did not contravene these provisions of IRCA in its employment relationship with Castro. Petitioner did examine relevant documents and did not know that Castro lacked authorization to work in the United States either when it hired him or when it laid him off. See Pet. App. 84a-85a & n.11.[20] Accordingly, the Board's order recognizes that, at least as of the date that petitioner laid off Castro, petitioner could have

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[20] Moreover, under 8 U.S.C. 1324a(a)(3), an employer that "establishes that it has complied in good faith with" the verification requirements of Section 1324a(b) "has established an affirmative defense" that the employer has not violated the statute's prohibition against knowingly hiring unauthorized aliens. The Board's findings in respect to petitioner's effort to verify whether Castro was authorized to work at the time of hire (see Pet. App. 84a-85a & n.11) are consistent with a conclusion that petitioner could have established that affirmative defense under IRCA.

continued to employ him for a limited period of time without violating IRCA.[21]

The Board's decision to cut off Castro's back pay award as of June 14, 1993 (but not before) based on his employment-related misconduct also reasonably accommodates IRCA. Once petitioner discovered Castro's unauthorized immigration status on June 14, 1993, it could not have continued to employ Castro after that date (had he not already been laid off in violation of the NLRA), because IRCA makes it unlawful for an employer "to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." 8 U.S.C. 1324a(a)(2). But because petitioner had previously employed Castro, it could have rehired him at any time before that date without checking his documents (for example, to comply with the Board's order finding it in violation of the NLRA), as long as it did not otherwise become aware that Castro was an undocumented alien. See 8 C.F.R. 274a.2(b)(1)(viii)(A)(5). In these circumstances, by cutting off Castro's entitlement to back pay as of June 14, 1993, the Board reasonably accounted for

[21] We do not suggest that a Board order awarding back pay to an undocumented alien discharged in violation of Section 8(a)(3) would be invalid if the employer had initially hired or retained the discriminatee knowing that he was not authorized to work in the United States. In that situation, the Board has concluded that a limited award of back pay is appropriate. See pp. 6-8, *supra*; *A.P.R.A. Fuel*, 320 N.L.R.B. 408, 416 (1995), aff'd, 134 F.3d 50 (2d Cir. 1997); Pet. App. 83a. The Board has explained that that distinct back pay remedy is warranted to reduce the incentive for "unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity." *A.P.R.A. Fuel*, 320 N.L.R.B. at 415. Estoppel may also present another reason why an employer should not entirely escape back pay liability in such situations. In this case, the court of appeals expressly did not address the propriety of a back pay remedy in such situations (see Pet. App. 20a), and this Court need not reach that issue here.

the fact that, although Castro had sustained economic harm due to petitioner's NLRA violation up to that date, effective on that date Castro presumably would have suffered a termination of employment by petitioner once petitioner learned of his unauthorized status.

3. The availability of back pay for undocumented aliens who are discharged in violation of federal labor law but who remain in the United States also advances the underlying policies of IRCA. IRCA is based squarely on Congress's determination that "[e]mployment is the magnet that attracts aliens here illegally." See H.R. Rep. No. 682, 99th Cong., 2nd Sess. Pt. 1, at 46 (1986). Congress also concluded that "the hiring of undocumented workers adversely affects American employees because alien workers, out of desperation, will work in substandard conditions and for starvation wages." *A.P.R.A. Fuel*, 320 N.L.R.B. at 413-414. Congress therefore enacted penalties against employers who knowingly employ undocumented workers or fail to check their documentation in order to deter employers from hiring unauthorized aliens and, in turn, to deter aliens from entering illegally to seek employment.

The Board's provision for limited back pay to discriminatees such as Castro advances this deterrent objective of IRCA. If employers were absolved from their obligation to compensate undocumented aliens discharged in violation of federal labor laws, the deterrent effect of IRCA's penalties would be undermined by employers' monetary incentive to hire undocumented workers willing to work for lower wages and without labor protections, rather than citizens and aliens authorized for employment here. An employer might, for example, compare the monetary cost of compliance with IRCA's employment-verification system and the monetary effect of potential sanctions under IRCA with the savings of employing undocumented workers and the perceived benefits of union avoidance, and decide that it is worth the risk of

incurring IRCA's penalties to hire undocumented aliens. See *A.P.R.A. Fuel Oil*, 134 F.3d at 57. The availability of a limited back pay remedy ensures that employers will "realize[] that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers," and thus reduces "any incentive to hire such illegal aliens." *Sure-Tan*, 467 U.S. at 893.

Other provisions of IRCA reinforce the point that monetary remedies for undocumented aliens who have suffered violations of federal labor laws advance the deterrent purposes of IRCA. In Section 111(a)(1) of IRCA, Congress stated that one of the "essential elements of the program of immigration control established by this Act" is "an increase in the * * * enforcement activities" of "appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States." 100 Stat. 3381. To that end, in Section 111(d) of IRCA, Congress appropriated funds for "such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division and the Office of Federal Contract Compliance Programs [OFCCP] within the Employment Standards Administration of the Department in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." 100 Stat. 3381.

Back pay is a conventional remedy available when the Wage and Hour Division of the Department of Labor enforces the FLSA and when OFCCP enforces programs prohibiting discrimination by federal contractors.[22] In providing

[22] See 29 U.S.C. 216(c) (unpaid minimum wages and overtime compensation); see also *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960) (back pay available when Department of Labor enforces the FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3)); *United States* v. *Whitney Nat'l Bank*, 671 F. Supp. 441 (E.D. La. 1987) (back pay available when OFCCP enforces programs prohibiting discrimination by federal contractors); *United States* v. *Duquesne Light Co.*, 423 F. Supp. 507 (W.D. Pa. 1976) (same); 41 C.F.R. 60-1.26(a)(2) (same). Congress likely had in mind back pay as the monetary sanction because civil penalties are not available when the Department of Labor enforces the FLSA's anti-retaliation provision or when OFCCP enforces anti-discrimination provisions. Civil penalties under the FLSA for minimum wage and overtime violations were not enacted until 1989, after IRCA. See Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 9, 103 Stat. 945.

for increased enforcement of those provisions to deter employers from hiring undocumented aliens, Congress thus clearly anticipated that employers would be subject to monetary liability for back pay to undocumented alien workers. That result is inconsistent with any suggestion that IRCA catagorically limited the legal protections available to such workers under federal labor laws.[23]

4. Petitioner contends (Br. 20, 24) that the Board's limited back pay order in this case is inconsistent with IRCA's prohibition against an employer's knowingly hiring or continuing to employ an unauthorized alien. See 8 U.S.C. 1324a(a)(1) and (2). There is no merit to that assertion. Rather, as we have explained, during the back pay period defined by the Board (*i.e.*, January 31, 1989, through June 14, 1993), petitioner could have continued to employ Castro (had he not already been laid off in violation of the NLRA) without violating IRCA. Moreover, unlike a reinstatement order, the back pay award to Castro does not require peti-

[23] The Department of Labor's Employment Standards Administration and the INS have also recognized, in a memorandum of understanding concerning enforcement of labor-standards laws, that "vigorous targeted enforcement of labor standards can serve as a meaningful deterrent to illegal immigration" because "[i]t denies some of the business advantages that may be gained through the employment of highly vulnerable and exploitable workers at sub-standard wages and working conditions." See Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor (Nov. 23, 1998), *available at* <http://www.dol.gov/dol/esa/public/whatsnew/whd/mou/nov98mou.html>

tioner to hire Castro in contravention of IRCA; it only requires petitioner to compensate Castro for a period of employment that would not have violated IRCA. The back pay award therefore does not place petitioner in a position of conflicting obligations under two federal statutes.

Petitioner also maintains (Br. 20, 24, 27-28) that the Board's limited back pay order is inconsistent with IRCA's prohibition against an employee's misuse of identification documents to secure employment. See 18 U.S.C. 1546(a) and (b) (1994 & Supp. V 1999). That contention is unpersuasive. Although Congress chose, in Section 1546(b)(1) and (2), to criminalize the misuse of identification documents, it did not also make violators ineligible for back pay awards or other compensation flowing from employment secured by the misuse of such documents. And because Congress recognized that the availability of back pay to undocumented aliens *promotes* enforcement of the immigration laws (see pp. 36-37, *supra*), the Board therefore could reasonably decline to invoke the document-misuse provisions as a complete bar to any award of back pay to Castro.[24]

Petitioner's reliance on the criminal provisions of 18 U.S.C. 1546(b) to bar the Board's award of limited back pay to Castro also finds little support in this Court's decisions. The Court has concluded that the Board is not required to deny a remedy under the NLRA to a discriminatee who gives false testimony under oath before the agency. See

[24] Subsequent to IRCA, Congress revisited the issue of the misuse of identification documents by employees and enacted additional civil penalties. See Immigration Act of 1990, Pub. L. No. 101-649, § 544, 104 Stat. 5059-5061. Yet, as in IRCA, Congress, in the 1990 Act, did not provide any disqualification from entitlement to back pay awards for employees who misuse identification documents. See 8 U.S.C. 1324c(a) and (d)(3). The civil penalties enacted in the 1990 Act were not made retroactive, and therefore do not apply to Castro's misuse of false identification documents, which occurred in 1988.

ABF Freight Sys., Inc. v. *NLRB*, 510 U.S. 317, 322-325 (1994). Likewise, the Court has rejected the contention that, in a Title VII case, a court should enter judgment against a defendant employer solely because it has lied about its reason for the adverse employment action at issue. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 521 (1993) (explaining that "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that"). Accordingly, while Castro could have been prosecuted for his fraud under IRCA, it does not follow that the Board was required to deny a back pay remedy to Castro, and thereby relieve petitioner of the conventional monetary liability that flowed from its own unlawful conduct, namely, laying off an employee in violation of the NLRA.[25]

Moreover, as the court of appeals observed (Pet. App. 14a), the legislative history of IRCA confirms that Congress "did not intend the statute to limit the NLRA even indirectly." The relevant House committee report explains

[25] There is, accordingly, no merit to petitioner's contention (Br. 24) that the availability of back pay to undocumented aliens like Castro improperly rewards their use of fraudulent documents to gain employment. Congress has authorized substantial criminal and civil penalties for such misconduct; an alien who uses such false documents may be imprisoned for up to five years, see 18 U.S.C. 1546(b), may be subjected to civil penalties, see 8 U.S.C. 1324c(a)(4) and (d)(3), and may be deported as well, see 8 U.S.C. 1227(a)(3)(C)(i). Any alien who engages in such document fraud does so, therefore, at substantial peril to himself. Nevertheless, Congress did not bar all back pay for undocumented aliens, and indeed in IRCA it authorized increased enforcement of labor-standards laws, in recognition of the fact that such enforcement (including a potential monetary remedy for the benefit of undocumented aliens) also deters illegal immigration by reducing employers' economic incentive to hire undocumented aliens. See pp. 36-37, *supra*. Faced with competing considerations as to the optimal deterrence of illegal immigration, Congress simply did not preclude all undocumented aliens from receiving back pay, and to have done so might well have undermined enforcement of the Nation's immigration laws.

that no provision of IRCA should "be used to * * * limit the powers of federal or state labor relations boards * * * to remedy unfair practices committed against undocumented employees for * * * engaging in activities protected by existing law." H.R. Rep. No. 682, *supra*, Pt. 1, at 58. Although the committee report does not indicate the precise parameters of the remedy that Congress expected the Board to award undocumented workers victimized by NLRA violations, the legislative history yields no support for the proposition that Congress sought to combat illegal immigration by (as petitioner urges) denying remedies for labor law violations to undocumented workers.

5. Petitioner argues (Br. 25) that an award of back pay for undocumented aliens like Castro who remain in the United States after being illegally discharged encourages such aliens to extend their illegal stay. That contention, however, is based on the doubtful speculation that undocumented workers will consider the possibility of receiving back pay, perhaps after years of litigation, in deciding whether to remain in the United States or to return home after being discharged. In fact, such discharged undocumented workers are far more likely to focus on obtaining a new job immediately, if such employment is available. See *Patel* v. *Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (noting that "[i]t is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders"). At any rate, such judgments about the likely effects of the Board's remedial orders are principally for the Board to make in determining how its remedial authority should be exercised. As this Court explained shortly after enactment of the NLRA:

> [Congress left] the adaptation of means to ends to the empiric process of administration [by the Board]. * * * Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confine of law into the more spacious domain of policy. * * * [T]he power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

Phelps Dodge, 313 U.S. at 194.

There is also no merit to petitioner's claim (Br. 25) that, in awarding Castro limited back pay, the Board either "excus[ed] Castro's failure to mitigate his damages" or "sanction[ed] the perpetration of a fraud by Castro on yet another unsuspecting employer." The Board did not excuse any alleged "failure" by Castro to mitigate his loss of income after petitioner unlawfully laid him off. See generally *Nathanson*, 344 U.S. at 29 (in calculating net back pay, Board deducts "actual interim earnings"). Rather, the Board found (Pet. App. 85a-86a n.12) that Castro "satisfied his obligation to make reasonable efforts to find interim work following his unlawful layoff" by securing such jobs as a carpenter's helper and a gardener. Nor is there any evidentiary basis in the record for a conclusion that Castro tendered fraudulent identification documents in obtaining interim work. Petitioner adduced no such facts in the compliance proceeding before the Board. It may well be that the employers with which Castro secured interim employment either hired him without complying with the "employment verification system" set forth in 8 U.S.C. 1324a(b), or were not legally obligated to verify Castro's work authorization prior to hiring him.[26]

---

[26] An INS regulation provides that "employment" does not include "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent." 8 C.F.R.

Finally, there is no merit to petitioner's suggestion (Br. 17) that issuance by the Board of a cease and desist order alone represents the only proper accommodation of the NLRA and IRCA in this case. As this Court has explained in the context of Title VII, "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). Rather, "[i]t is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices." *Id.* at 417-418 (internal quotation marks omitted).

The same reasoning holds true in the context of unfair labor practices under the NLRA. As this Court has recognized, a back pay order provides "more certain deterrence against unfair labor practices" than does a Board cease-and-desist order alone. *Sure- Tan*, 467 U.S. at 904 n.13. To be sure, as the Court also held in *Sure-Tan*, back pay is not available for undocumented aliens in some circumstances, just as it is not available in some circumstances for other employees who remove themselves from the labor market or are otherwise not physically capable of working legally in the United States. See pp. 20-22, *supra*. But it does not follow that back pay under the NLRA (or other federal labor laws) is *never* available for undocumented alien workers, and such a holding could impair the effective enforcement of both the Nation's labor and immigration laws. Neither *Sure-Tan* nor IRCA requires such a result.[27]

274a.1(h). An employer's obligation to verify an individual's authorization for "employment" does not extend to such casual work. See 8 C.F.R. 274a.2(b)(1)(i). Some of the work that Castro obtained after his layoff by petitioner could have been the kind of casual employment for which verification was not required (*e.g.*, his work as a gardener).

[27] In attempting to demonstrate that the Board's limited back pay order in this case is precluded by IRCA, petitioner relies (Br. 21-22) on the response of the government's attorney to a hypothetical question posed by a Member of the Court at oral argument in *Sure-Tan*, concerning the permissibility of a back pay award if Congress were to enact legislation making it illegal to hire an alien not lawfully present in the United States. That reliance is misplaced. A lawyer's response to a hypothetical question at oral argument concerning a law that had not yet been passed by Congress or interpreted by the Board is entitled to little weight as a gloss on a statute that was subsequently enacted. When, after Congress enacted IRCA, the Board did have occasion to consider the significance of IRCA for the appropriateness of back pay awards to undocumented aliens, the Board carefully examined the new legislation and determined that a such a back pay award would accommodate and, indeed, further, the purposes of IRCA. See pp. 6-8, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari To The United States Court of Appeals
For The District of Columbia Circuit

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INTRODUCTION

Jose Castro committed at least four criminal acts during his extended illegal stay in the United States. First, he entered this country illegally in violation of the INA. 8 U.S.C. § 1325. Second, he obtained employment at Hoffman by presenting fraudulent immigration documents in violation of the INA and IRCA. 18 U.S.C. § 1546; 8 U.S.C. § 1324c. Third, he committed perjury in violation of 18 U.S.C. § 1621 by lying under oath about his identity during the NLRB's compliance proceeding. *See, ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 328-29 (1994). Fourth, he committed a continuing violation of the INA by remaining in this country illegally during his employment at Hoffman and for at least four years thereafter. *Montero v. INS*, 124 F.3d 381, 385 (2d Cir. 1997). And, finally, the record indicates that Castro compounded his prior illegal conduct by continuing to use fraudulent documents to obtain employment during the backpay period. *See infra* pp. 14-15. Against this backdrop of repeated criminal misconduct, this Court must consider whether Hoffman's violation of the NLRA, a civil statute not punitive in nature, justifies an award of backpay to an undocumented alien who never was lawfully present or lawfully entitled to work in this country during the backpay period. Under *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), and this country's immigration laws and policies, backpay must be denied and the decision of the D.C. Circuit must be reversed.

The Board and amici adopt a series of false premises to convince this Court to affirm the D.C. Circuit's erroneous decision. They contend that *Sure-Tan* denies backpay only to undocumented aliens who leave this country as they should, but not to undocumented aliens like Castro who extend their unlawful stay. They argue that the same

immigration laws that made Castro's entry and continued presence in this country illegal somehow entitle him to backpay. They claim that, although Hoffman knew nothing about Castro's illegal status, backpay is necessary to deter unscrupulous employers from unlawful employment practices. They maintain that denying backpay to Castro lets Hoffman off the hook for a violation of the NLRA, while at the same time they trivialize Castro's criminal misconduct. And, they attempt to justify the D.C. Circuit's erroneous award of backpay to Castro by improperly applying the after-acquired evidence and mitigation doctrines.

The D.C. Circuit's decision must be reversed, however, because it conflicts with this country's immigration laws and this Court's holding in *Sure-Tan*. The INA made Castro's presence in this country illegal and his employment unauthorized. This Court in *Sure-Tan* properly accounted for the INA by tolling backpay for an undocumented alien during any period when the undocumented alien is not legally entitled to be present and employed in this country. By affirming the Board's award of backpay to Castro, the D.C. Circuit disregarded the INA and sent the message that he who illegally enters this country, violates its laws and successfully evades capture will be rewarded. This Court should restore the proper balance between the immigration laws and the NLRA by holding that Castro is not entitled to backpay for any period during which he was not legally present and legally entitled to work in this country.

ARGUMENT

False Premise No. 1: *Sure-Tan* Denies Backpay Only to Undocumented Aliens Who Leave the Country

The Board maintains that, because the Sure-Tan discriminatees voluntarily departed the country on the first day of the backpay period, *Sure-Tan* denies backpay only to those undocumented aliens who leave the country as they should, but justifies backpay to those undocumented aliens, like Castro, who remain in the United States in violation of the immigration laws.[1] Brief for the NLRB ("Respondent's Brief"), p. 17. The Board's approach conflicts with *Sure-Tan's* plain language. Nowhere in *Sure-Tan* did this Court state either expressly or implicitly that an undocumented alien's mere physical presence was sufficient to entitle the undocumented alien to backpay.

1 The AFL-CIO urges the same conclusion, insisting footnote 11 of *Sure-Tan* supports this result. Brief of the AFL-CIO, p. 28. This footnote states, in part, "the Court of Appeals 'estimated' an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence." *Sure-Tan*, 467 U.S. at 901, n.11. This language was intended only to highlight the speculative nature of the Seventh Circuit's remedial award and to rebut Justice Brennan's conclusion that "the Court of Appeals had estimated the proper minimum backpay award with a fair degree of precision." *See, Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120 (7th Cir. 1992); *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 654 n. 1 (D.C. Cir. 2001) (J. Sentelle, dissenting). This Court quickly disposed of the issues raised in footnote 11, however, by concluding that an undocumented alien's lack of legal presence and legal unavailability for work deprives him of any backpay whatsoever. 467 U.S. at 903-04 (tolling backpay during such periods and noting the "probable unavailability" of a backpay award).

Instead, the Court repeatedly stated that backpay could not be awarded based upon physical presence alone. At page 903 of the *Sure-Tan* decision, this Court held, "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not *lawfully entitled to be present* and employed in the United States." 467 U.S. at 903 (emphasis added). At footnote 12, the Court repeated that the employees would be deemed "'unavailable' during any period when they were not *lawfully present* ...." *Id.* (emphasis added). The Court continued, "We share the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able ... to establish at the compliance proceedings that they were *lawfully available* for employment during the backpay period." *Id.* at 904 (emphasis added). Despite this uncertainty, the Court stated, "The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act." *Id.*

Justice Brennan criticized the Court for holding that undocumented aliens are "employees" protected by the NLRA, while at the same time "effectively depriv[ing] them of any remedy ...." *Id.* at 911. The Court responded to his criticism as follows:

> "This argument completely ignores the fact that today's decision leaves intact the cease and desist order imposed by the Board, ..., one of the Act's traditional remedies for discriminatory discharge cases. Were petitioners to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act. At the same time, we fully recognize that the reinstatement and backpay awards afford both more certain deterrence against unfair labor practices and more meaningful relief for the illegally discharged employees. Nevertheless, we remain bound to respect the directives of the INA as well as the NLRA and to guard against judicial distortion of the statutory limits placed by Congress on the Board's remedial authority. Any other solution must be sought in Congress and not the courts."

Id. at 904, n.13. Thus, the Court was acutely aware that *Sure-Tan* would be understood as broadly depriving undocumented aliens of any backpay remedy. If the Court did not intend that to be the interpretation, it would have highlighted the limitations of its holding in response to Justice Brennan's criticism. But, the Court did no such thing. Instead, the Court reaffirmed its intent to deny undocumented aliens the more effective remedies of the NLRA, because to do otherwise would conflict with the INA.

Acknowledging that *Sure-Tan* requires legal – not simply physical – presence, the Board contends that, in conditioning backpay upon legal presence, the Court sought only to deter the Sure-Tan discriminatees from illegally reentering this country to claim backpay awards. Respondent's Brief, p. 23-24. The Board maintains that, because Castro was physically present (albeit illegally) during the backpay period, his continued illegal presence was of no consequence. Apparently, the Board believes that, while this Court is concerned with an undocumented alien's repeated illegal entry, it is singularly unconcerned with an undocumented alien's continued illegal presence. Petitioner doubts that this Court is so cavalier about continuing violations of this country's immigration laws. *See, INS v. Lopez-Mendoza,* 468 U.S. 1032, 1046 (1984) (refusing to apply the exclusionary rule to deportation proceedings because

doing so would ignore an undocumented alien's continuing violation of the immigration laws).[2]

Although the *Sure-Tan* Court never endorsed an award of backpay to an undocumented alien based solely on the alien's illegal physical presence, the Board argues that such a position is consistent with its longstanding availability doctrine. Under this doctrine, backpay is tolled during any period when the discriminatee removes himself from the workforce because he is unavailable to work. Based on this doctrine, the Board claims that this case is distinguishable from those cases where it has denied backpay to employees who are incarcerated or inducted into the armed forces because such employees "are unavailable for work during that period and could not physically enter the labor market without breaking the law." Respondent's Brief, p. 21. This argument proves too much. Just like the incarcerated or inducted individual, Castro could not enter the labor market without breaking the law. Indeed, he entered the labor market only by illegally entering this country and by

2 The Board mistakenly concludes that *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), signals this Court's approval of backpay awards to undocumented aliens who are physically present in the United States. Respondent's Brief, p. 24-25. In a footnote to *Lopez-Mendoza*, this Court cited *Sure-Tan* for the proposition that an employer may be guilty of an unfair labor practice "in his dealings with an alien notwithstanding the alien's illegal presence in this country." 468 U.S. at 1047 n.4. The Court noted that, in such situations, "retrospective sanctions" may be imposed but "prospective relief" must be denied. *Id.* The *Lopez-Mendoza* Court never mentioned backpay, however. And, because *Sure-Tan* expressly denied backpay to undocumented aliens, it is unlikely that the *Lopez-Mendoza* Court's reference to *Sure-Tan* contemplated backpay. Instead, it is more likely that the *Lopez-Mendoza* Court was referring to *Sure-Tan's* cease and desist order, which was the only "retrospective sanction" approved by the Court.

illegally presenting fraudulent employment documents to secure a job at Hoffman.

As further support for its proposition that only physical, not legal, unavailability tolls backpay, the Board cites a series of cases where backpay was awarded to discriminatees even though the discriminatees lacked a legal qualification to perform the work for which they were hired. Respondent's Brief, p. 21, n.12. Notably, none of these cases involve employees who were completely disqualified by the INA or IRCA from working for any employer as was Castro because of his illegal status. Instead, in *Justrite Mfg. Co.*, 238 N.L.R.B. 57 (1978), the discriminatee was disqualified from the job for which she was hired because she was not yet eighteen years old. There, the Board awarded backpay because the employer knew of her legal disqualification prior to her discharge, but the Board ordered backpay to commence only after the discriminatee turned eighteen. In *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140 (2d Cir. 1990), backpay was awarded to a truck driver who lacked a valid driver's license because the court determined that the employer knowingly retained other drivers without valid licenses during the backpay period. *Id.* at 145 ("Since Howell could not legally drive for this company without a valid license, he was wronged only to the extent that the company failed to employ him while continuing to employ other unlicensed drivers."). *See also, NLRB v. IBEW Local Union 112*, 992 F.2d 990, 995 (9th Cir. 1993) (backpay awarded to unlicensed electrician in hiring hall case where union had dispatched other unlicensed electricians). These cases are easily distinguishable. As the Board determined, Hoffman did not know about Castro's illegal status and did not knowingly retain other undocumented aliens at the same time that it discharged Castro. Appendix to Writ of Certiorari ("App. ") 84a-85a, and n.11.

Castro's illegal status rendered him unavailable for work. U.S. Dept. of Labor, Unemployment Insurance Program Letter No. 1-86, 51 Fed. Reg. 29713 (August 20, 1986) ("an alien must be legally authorized to work in the United States to be considered 'available for work.'"). Because Castro was neither legally present nor lawfully entitled to employment during the backpay period, he was not entitled to backpay. *Sure-Tan*, 467 U.S. at 903. Thus, the D.C. Circuit's decision to enforce the Board's backpay award to Castro must be reversed.

False Premise No. 2: The Immigration Laws Require an Award of Backpay to Castro

Arguing that nothing in either the INA or IRCA expressly prohibited Castro's employment, the Board concludes that awarding backpay to Castro actually "advances" the immigration laws. Respondent's Brief, p. 35. The Board's faulty conclusion is based on its misunderstanding of the immigration laws.

The INA controls immigration by making unauthorized entry into this country illegal and by authorizing entry for purposes of employment only in specific circumstances. 8 U.S.C. §1182(a)(5) (formerly 8 U.S.C. § 1182(a)(14)); 8 U.S.C. § 1101(a)(15); 8 U.S.C. § 1325. For instance, a tourist may legally enter this country on a tourist visa for pleasure for a temporary period of time. But, the tourist visa does not permit the visa holder to engage in employment during the holder's stay. 8 U.S.C. § 1182(a)(5); 8 U.S.C. 1101(a)(15)(B); *see also*, 8 C.F.R. § 274a.12 (list of classes of aliens authorized to work). Rather, to legally enter this country and perform work, the INA has long required an alien to hold an immigrant or nonimmigrant visa that specifically authorizes

the alien to work in the United States. 8 U.S.C. § 1182(a)(5) ; 8 U.S.C. § 1101(a)(15) . Thus, under the INA, legal presence alone does not entitle an alien to perform work in this country. The *Sure-Tan* Court appreciated this distinction when it held that backpay would be tolled during any period that an undocumented alien was not both legally present and legally authorized to work. 467 U.S. at 903; *see also,* 467 U.S. at 893 (quoting from 8 U.S.C. § 1182(a)(14) that "immigrant aliens are therefore admitted to work in this country only if they 'will not adversely affect the wages and working conditions of workers in the United States similarly employed.'").

IRCA amplified the INA's employment restrictions. With its enactment in 1986, "IRCA corrected an unfair double standard in immigration law that prohibited unauthorized aliens from working in the United States, but permitted employers to hire them."[3] Immigration and Naturalization Service, "IRCA Employer Sanctions," (November 13, 2001), available at <http://www.ins.usdoj.gov/graphics/aboutins/history/sanctions.html>. So, while IRCA instituted new penalties for employers who hire undocumented aliens,[4] the

[3] The ACLU insists that IRCA focuses solely on employer conduct. Brief Amici Curiae of ACLU and Make the Road by Walking, Inc., p. 7. This is not the case. IRCA also focuses on undocumented aliens by prohibiting them from obtaining employment by presenting fraudulent immigration documents. 8 U.S.C. § 1324c.

[4] After IRCA was enacted, even the NLRB realized that IRCA required the denial of backpay to undocumented aliens. NLRB General Counsel Memorandum 87-8, p. 2 (October 27, 1987), Westlaw 1987 WL 109409 (N.L.R.B.G.C.) (stating that, with respect to undocumented workers hired after 1986 who evince no intent to seek temporary resident status, "reinstatement and backpay would not be sought."). The Board has since changed its position, just as it changed its position with respect to *Sure-Tan*. *See* NLRB General Counsel Memorandum 98-15

INA continued to prohibit aliens from working unless they legally entered this country with the proper work authorization.

Under both the INA and IRCA, Castro's employment was unlawful. He violated the INA by entering this country illegally and by obtaining work without authorization. Further, because IRCA forbade Hoffman from employing him, Castro obtained employment at Hoffman only by presenting fraudulent immigration documents in violation of the INA and IRCA. Although the INA and IRCA plainly made Castro's employment unlawful, the Board contends that its backpay award to Castro somehow advances the underlying policies of these immigration laws.[5] The Board's contention is incomprehensible.

Even before IRCA, the "primary purpose in restricting immigration [was] to preserve jobs for American workers." *Sure-Tan,* 467 U.S. at 893. With the enactment of IRCA, Congress recognized that the magnet that draws illegal

(September 4, 1998), Westlaw 1998 WL 1806350 (N.L.R.B.G.C.); Brief of Petitioner p. 5-6, n.5.

5 Amici States of New York, Arizona, California, Hawaii, Massachusetts and West Virginia, and the Commonwealth of Puerto Rico worry that construing the INA and IRCA to preclude backpay to an undocumented alien under the NLRA may result in the preemption of state laws that provide monetary remedies to undocumented aliens under other circumstances. Brief of Amici Curiae States of New York et al., p. 15. This issue is not before the Court. And, even if this issue were somehow relevant here, this Court has held that Congress, in enacting the INA, did not preclude the states from regulating the employment of undocumented aliens. *De Canas v. Bica,* 424 U.S. 351, 357 (1976) ("we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship . . . .").

aliens to this country is wages. Yet, the Board advocates giving Castro the very thing that drew him here in the first place - money.[6] The Board cannot, and does not, explain how awarding backpay to Castro will encourage him or other undocumented aliens to cease their ongoing violation of the immigration laws by leaving the country,[7] how it will

6 The Board and amici draw support for their position from IRCA's legislative history, section 111 of IRCA, and a report from the Select Commission on Immigration and Refugee Policy ("SCIRP Report"). As Petitioner has previously explained, IRCA's legislative history left *Sure-Tan's* remedial holding intact and, therefore, provides no guarantee of backpay to undocumented aliens. Brief of Petitioner, p. 25-27. Until recently, the NLRB agreed. *See* NLRB General Counsel Memorandum 88-9, p. 3 (September 1, 1988), Westlaw 1988 WL 236182 (N.L.R.B.G.C.) ("[T]he relevant committee report points out [that] Sure-Tan was the existing law and that decision itself limited the remedial powers of the NLRB. Clearly Congress did not intend to overrule Sure-Tan.... [I]t is Sure-Tan, not IRCA, that limits the power of the NLRB to order reinstatement and backpay to an employee who is not 'entitled to be employed' in the U.S."). Similarly, section 111 of IRCA fails to address backpay for undocumented aliens. Instead, this section provides funds for law enforcement activities by the INS, the Wage and Hour Division and the OFCCP to deter the employment of undocumented aliens. The simple fact that the Wage and Hour Division and the OFCCP may generally award backpay to authorized workers, does not evince any Congressional intent to award an undocumented alien backpay for a violation of the NLRA. Nor does the SCIRP Report contain any evidence of a Congressional intent to award backpay to undocumented aliens. This Report pre-dated IRCA by five years. And, although the Report states that the Commission discussed, but rejected "penalties that could be imposed on those who seek undocumented/illegal employment," nothing in the Report suggests that a denial of backpay under the NLRA was even considered. Select Commission on Immigration and Refugee Policy, Senate and House Committees on the Judiciary, 97th Cong., *U.S. Immigration Policy and the National Interest* (Joint Comm. Print 1981), p. 65.

7 Although the Board and amici contend that undocumented aliens do not come to America for the protection of our labor laws, they cannot dispute that the prospect of a backpay award encourages

deter other aliens from illegally entering the country, or how it will discourage undocumented aliens from using fraudulent documents to obtain employment.

Instead of focusing on deterring undocumented aliens like Castro from violating the immigration laws, the Board focuses entirely on deterring employers from violating the NLRA. The Board and amici argue that denying backpay to Castro will encourage unscrupulous employers[8] to hire undocumented aliens in violation of IRCA so that the employer can benefit by retaliating against the alien in violation of the NLRA. As an initial matter, this argument is misplaced in this case. There is no dispute that Hoffman hired Castro without any knowledge of his illegal status[9]

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undocumented aliens to continue their illegal presence. Indeed, one amicus states "[i]f undocumented workers were foreclosed from monetary remedies it would be impossible to obtain their assistance in law enforcement investigations...." Brief of Amici Curiae States of New York et. al., p. 3. Implicit in this concern is the admission that backpay is often the incentive that keeps undocumented aliens in this country.

8 It is noteworthy that, while the Board and amici argue that *Sure-Tan* must be narrowly confined to its specific facts, they seek to extend this case far beyond the facts presented. Indeed, amici seek to equate Hoffman with sweatshops and other "scofflaw businesses" that knowingly hire illegal aliens to reap some competitive advantage. *See, e.g.*, Brief Amici Curiae of Employers and Employer Organizations In Support of Respondent, p. 8. Yet, unlike these unscrupulous employers, Hoffman had no knowledge regarding Castro's illegal status and could not have benefited therefrom.

9 Because the arguments advanced by amici rest on the premise that denying backpay to Castro will lead unscrupulous employers to hire undocumented aliens in violation of IRCA only to retaliate against them in violation of the NLRA, they attempt to mislead this Court by suggesting that Hoffman had knowledge of Castro's illegal status. Brief Amici Curiae of Employers and Employer Organizations, p. 7; Brief of Amici Curiae National Employment Law Project et. al., p. 7.

and, thus, Hoffman could not have benefited by retaliating against Castro because of his status. Furthermore, if an employer willfully violates IRCA, it is subject to substantial civil and criminal penalties. The INS has demonstrated that it will use these penalties to secure employer compliance. For instance, the INS recently ordered Aid Maintenance to pay nearly $106,000 in fines for IRCA violations. *U.S. v. Aid Maintenance Co.*, 8 O.C.A.H.O. 1023 (March 18, 1999), 1999 WL 497195 (O.C.A.H.O.). Similarly, the INS assessed nearly $400,000 in fines against Disneyland for alleged IRCA violations. Tracey Eaton, *INS Fines Disney a Record $395,*000, The Orange County Register, May 6, 1993, at A1. And, just last month, a federal grand jury indicted Tyson Foods for alleged violations of the immigration laws. Robert L. Jackson, *Tyson Foods Is Indicted In Immigration Smuggling*, Los Angeles Times, December 20, 2001, at A1.[10]

By focusing on the potential for unscrupulous employers to violate the NLRA, but ignoring Castro's repeated violations of the immigration laws, the Board and amici seek to elevate

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The Board itself has rejected this contention, stating that "the record clearly shows that the Respondent only hired Castro after he had supplied, as the Respondent required, documents that appeared to be genuine and relate[d] to the person presenting them." App. 85a; *see also,* Respondent's Brief, p. 33 ("Petitioner did examine relevant documents and did not know that Castro lacked authorization to work in the United States either when it hired him or when it laid him off.").

10 According to the Board and amici, these sanctions are insufficient to deter some employers. However, they cannot explain how the simple prospect of a backpay remedy will deter a rogue employer who is so intent on breaking the law. In any event, Congress has determined that the employer sanctions contained in 8 U.S.C. § 1324a are a sufficient deterrent for a violation of IRCA. If the Board and amici believe that these penalties are insufficient, their remedy lies with Congress and not this Court. *Sure-Tan,* 467 U.S. at 904 n.13.

the policies of the NLRA above the policies of the INA and IRCA. The D.C. Circuit fell prey to this argument and its decision must be reversed because, as this Court has taught, the Board's remedies must not conflict with the objectives of the immigration laws. *Sure-Tan,* 467 U.S. at 903. Although the remedy ordered in this case directly conflicts with the INA and IRCA, it was possible for the Board to issue a remedy that harmonized the NLRA and the immigration laws. The Board could have simply treated backpay the same as it treated reinstatement and commenced backpay on the date that Castro obtained authorization to work in the United States. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.,* 134 F.3d 50, 62 (2d Cir. 1997) (J. Jacobs, dissenting). This solution respects the policy goals of both the immigration laws and the NLRA by deterring employers from violating the NLRA while at the same time encouraging aliens to comply with the immigration laws. *Id.*

False Premise No. 3: Castro's Illegal Status Did Not Prevent Him From Lawfully Mitigating His Damages

Although Castro never was legally present or legally authorized to work at any time during the backpay period, the Board maintains that Castro still lawfully mitigated his damages because there is no "evidentiary basis in the record for a conclusion that Castro tendered fraudulent identification documents in obtaining interim work." Respondent's Brief, p. 41. The Board is mistaken.

On June 14, 1993, when asked at the compliance hearing whether he was, *at that time,* legally authorized to work in the United States, Castro testified, "I work with a birth certificate ... the birth certificate was loaned to me so that I can secure a job because I have no work." Petitioner's Supplement to the Deferred Appendix, p. 147 (filed with the

D.C. Circuit August 13, 1999). The ALJ determined that Castro used fraudulent documentation – not just to obtain employment at Hoffman – but to obtain work in the United States. App. 92a (Castro "testified that he *uses* the false identification in order to work in this country.") (emphasis added). So, four years after his discharge from Hoffman, Castro testified that he still used the fraudulent birth certificate to obtain work.[11]

In all likelihood, Castro was motivated to engage in these repeated fraudulent acts in violation of the immigration laws because of the very prospect of a backpay remedy. The NLRB instructs its Board agents to advise potential discriminatees of "their obligation to search for work and to report all interim earnings, inasmuch as a failure to do so may result in a loss or reduction of any backpay to which they might be entitled in the event that their case is found to be meritorious." 1 NLRB Casehandling Manual §10056.3 (June 1989). Thus, by communicating with Castro regarding his mitigation responsibilities, the Board likely encouraged Castro's continued illegal presence[12] and his repeated fraudulent acts.

Because Castro could not lawfully be employed in the United States, he could not lawfully mitigate his damages.

[11] The Board speculates, without any evidentiary basis, that Castro mitigated his damages by either securing interim employment with an employer who failed to comply with IRCA or with an employer who was not legally obligated to verify his work authorization. Respondent's Brief, p. 41-42, n.26

[12] *NLRB v. A.P.R.A. Fuel Oil Buyers Grp., Inc.,* 134 F.3d 50, 62 n.4 (2d Cir. 1997) (J. Jacobs, dissenting) ("Considering that NLRB proceedings can span a whole decade, [backpay] is no small inducement to prolong illegal presence in this country.").

By awarding backpay to Castro in disregard of his illegal status, the Board and the D.C. Circuit condoned Castro's continued illegal conduct and relieved him of his obligation to mitigate.

False Premise No. 4: The After-Acquired Evidence Rule Requires An Award of Backpay to Castro

The Board and the D.C. Circuit also absolved Castro of his continuing violation of the immigration laws by improperly applying the after-acquired evidence doctrine. According to the Board and the D.C. Circuit, the after-acquired evidence doctrine tolls backpay only upon the date that an employer first learns of an employee's misconduct. However, this blanket application of the after-acquired evidence rule is at odds with this Court's holding in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

In *McKennon*, the plaintiff sued her former employer for age discrimination. During plaintiff's deposition, the employer learned for the first time that, prior to her discharge, the plaintiff copied some of the employer's confidential financial documents. 513 U.S. at 355. The employer argued that the plaintiff's misconduct was grounds for her termination and that her misconduct deprived her of backpay or any other remedy. *Id.*

This Court held:

> "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information .... The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date

> of the unlawful discharge to the date the new information was discovered. *In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party."*

Id. at 362 (emphasis added). Thus, this Court acknowledged that, in some situations, the employee's misconduct justifies denying all relief.

In at least two cases since *McKennon*, the state courts have been confronted with the very circumstances that required the complete denial of backpay envisioned by *McKennon*. In *Camp v. Jeffer, Mangles, Butler & Marmaro*, 41 Cal. Rptr.2d 329 (Cal. Ct. App. 1995), a law firm that represented the Resolution Trust Corporation ("RTC") unknowingly hired two convicted felons. The RTC regulations required the law firm to certify that none of its employees had ever been convicted of a crime. In the course of discovery related to the employees' wrongful termination lawsuit, the law firm learned of the employees' convictions. The law firm argued that the after-acquired evidence doctrine barred any recovery. The California Court of Appeal agreed, stating:

> "We appreciate that the facts in *McKennon* ... presented a situation where balancing the equities should permit a finding of employer liability ....[13] However, the equities compel a different result where an employee who is disqualified from employment by government-imposed

[13] In *McKennon* and the vast majority of cases that arise under the after-acquired evidence doctrine, the employee misconduct amounts to no more than a violation of the employer's internal policies. Here, however, Castro's misconduct constituted repeated and continuing violations of the immigration laws.

> requirements nevertheless obtains a job by misrepresenting the pertinent qualifications. ... Since the Camps were not lawfully qualified for their jobs, they cannot be heard to complain that they improperly lost them. Given the nature of the misrepresentations, their potential damage to Jeffer Mangles, and the fact that the Camps were disqualified from employment by means of government requirements, the public policies of the state are adequately served by barring the Camps' claims...." *Id.* at 339-40.

Similarly, in *Cedeno v. Montclair State University*, 725 A.2d 38 (N.J. Super. 1999), *aff'd*, 750 A.2d 73 (N.J. 2000), the University learned during discovery that plaintiff, a public employee, had been convicted of a crime that disqualified him from public employment. Relying on *McKennon*, the court held that plaintiff's disqualification from employment disqualified him from receiving any relief for an alleged wrongful termination. *Id.* at 42-43.

The circumstances in this case present an even greater justification for denying backpay than did the circumstances in *Camp* and *Cedeno*. In *Camp* and *Cedeno*, the plaintiffs were disqualified only from a particular category of employment. In contrast, the immigration laws disqualified Castro from all employment. Accordingly, the Board and the D.C. Circuit should have applied the after-acquired evidence doctrine to bar backpay to Castro.

False Premise No. 5: Failing to Award Backpay To Castro Absolves Hoffman of a Violation of The NLRA

The Board and amici attempt to justify their disregard of the immigration laws and their improper application of the

mitigation and after-acquired evidence doctrines by arguing that denying backpay to Castro absolves Hoffman of its violation of the NLRA. This argument is without merit. Rather than absolve Hoffman of its violation, the Board levied other significant remedies against Hoffman in this case. The Board ordered Hoffman to cease and desist from further violations of the Act, to offer reinstatement and backpay to each of the other affected employees and to post a notice regarding its remedial order.

Discounting the deterrent effect of a cease and desist order, the Board claims that only backpay "provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices." Respondent's Brief, p. 42. This Court has previously rejected these same arguments. Indeed, in responding to Justice Brennan's criticism of its remedial holding in *Sure-Tan*, the Court described the cease and desist order as "one of the Act's traditional remedies for discriminatory discharge cases" and stated that "the threat of contempt sanctions" associated with the cease and desist order "provides a significant deterrent against future violations."[14] 467 U.S. 904 n.13. Thus, contrary to the argument advanced by the Board and amici, this Court already has determined that a cease and desist order was sufficient to deter Hoffman from future violations of the NLRA.

[14] Of course, in this case, there was additional deterrence in the form of backpay awarded to the other discriminatees. Neither the Board nor the amici explain how an additional award of backpay to Castro would further vindicate the policies of the Act.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit Court of Appeals should be reversed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and LPA, Inc., respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges the Court to reverse the decision below and thus supports the position of Petitioner Hoffman Plastic Compounds, Inc. before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 350 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, Inc. (LPA) is a public policy advocacy organization representing corporate executives interested in human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion of current situations and emerging trends in labor and employment policy. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA member companies have revenue exceeding $4.3 trillion annually.

All of EEAC's and LPA's member companies are employers subject to the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* In addition, all of EEAC's and LPA's members are subject to the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). For these reasons, EEAC, LPA, and their members have an ongoing interest in any application of the federal anti-discrimination laws, including but not limited to the NLRA, to an undocumented alien who obtains employment by presenting his or her employer—without the employer's knowledge—with fraudulent immigration documents.

As such, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC and LPA represent: Whether an undocumented alien who—without his employer's knowledge—obtained employment by presenting his employer with fraudulent immigration documents, is entitled to backpay as compensation for a violation of the NLRA if the undocumented alien never was legally authorized to work in the United States during the backpay period.

EEAC and LPA thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Furthermore, because of their significant experience in these matters, EEAC and LPA are uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

On January 31, 1989, Hoffman Plastic Compounds, Inc. (Hoffman) laid off several employees, including an employee known as "Jose Castro." Pet. App. at 5. The National Labor Relations Board (NLRB) later determined that Hoffman had violated the NLRA in laying off these employees and ordered Hoffman to offer reinstatement to each of the employees and to make them whole for any losses they had incurred. *Id.* Subsequently, the NLRB convened a compliance proceeding for the purposes of determining backpay. *Id.* There the employee known to Hoffman as "Jose Castro" testified that this was his true name. Pet. App. at 5-6. However, he then admitted that he was not a citizen of the United States and that he had obtained employment at Hoffman by presenting a borrowed birth certificate, an act made illegal by the immigration laws. *Id.*

In November 1993, an administrative law judge (ALJ) issued a decision regarding backpay for "Jose Castro." The ALJ determined that Castro was not entitled to either reinstatement or backpay because under *Sure-Tan, Inc. v.*

NLRB, 467 U.S. 883 (1984), backpay is tolled during any period when a discriminatee is not lawfully authorized to work in this country, and Castro never was lawfully authorized to work during the backpay period. Pet. App. at 6.

On September 23, 1998, a three-member NLRB panel reversed the ALJ's decision. Pet. App. at 6. The panel majority concluded that, notwithstanding the plain language of *Sure-Tan*, Castro was entitled to backpay from the date of his layoff until June 14, 1993, when Hoffman first learned that Castro used fraudulent identification to obtain employment. *Id.*

Hoffman subsequently filed a Petition for Review of the NLRB's decision with the U.S. Court of Appeals for the District of Columbia. The NLRB then filed a cross-application for the enforcement of its order. On March 17, 2000, the Court of Appeals rendered its initial decision. Pet. App. at 37. In a 2-1 decision, the Court of Appeals affirmed the NLRB's backpay award to Castro. *Id.*

Hoffman timely filed a Petition for Rehearing En Banc. The Court of Appeals granted that petition and vacated its earlier order. On January 16, 2001, in a 5-4 decision, the Court of Appeals narrowly affirmed the NLRB's backpay order to Castro even though Castro never was lawfully entitled to be employed in the United States during the backpay period. Pet. App. at 1. Hoffman petitioned this Court for a writ of *certiorari*, which was granted.

SUMMARY OF ARGUMENT

At a time when the federal immigration laws were silent as to the employment of undocumented workers, in *Sure-Tan*, the Court interpreted whether undocumented alien workers who have been discriminated against in violation of the NLRA are lawfully entitled to the remedy of backpay. The Court declared that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of

backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903.

In requiring employees to show that they were "lawfully available for employment during the backpay period," *id.* at 904, the Court said that the NLRB could not simply disregard the "equally important" Congressional policy underlying our immigration laws that unauthorized immigration is to be deterred. *Id.* at 903. The Court reasoned that to award undocumented aliens backpay when they are not lawfully available for employment would reward undocumented aliens for entering the United States illegally.

Since the Court decided *Sure-Tan*, Congress has expressly declared in the passage of IRCA that it is illegal—even criminal—to hire unauthorized aliens. *Sure-Tan* made clear that undocumented aliens are not entitled to backpay—irrespective of whether the undocumented alien has departed the country, and IRCA resolved any possible doubt as to whether undocumented aliens who are not lawfully available for employment can be awarded backpay. Clearly, they cannot.

IRCA's passage in 1986 was the product of a long process of information gathering and deliberation. In passing IRCA, Congress made difficult choices and drew careful lines to craft a cohesive immigration policy with significant impact on employers. IRCA reflects that Congress struck a delicate balance between the need to control illegal immigration and the need of aliens authorized to work in the United States to find gainful employment.

The Court of Appeals' decision in this case, which imposes upon an employer a punitive remedy not authorized by the NLRA, completely undermines the purpose and effect of IRCA. It distorts *Sure-Tan* to create a set of perverse incentives to undocumented aliens to remain in the United States and keep their unauthorized status concealed, by fraud if

necessary, for as long as possible so as to increase their potential monetary recovery under U.S. employment laws. The Court should reverse the Court of Appeals' ruling that illogically creates an entitlement to compensation for a job that the recipient was statutorily disqualified from holding in the United States.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDING OF *SURE-TAN* THAT THE NLRA DOES NOT PROVIDE FOR BACKPAY FOR WORKERS WHO, AS A MATTER OF LAW, WERE UNAVAILABLE FOR EMPLOYMENT IN THE UNITED STATES.

A. The NLRB Disregarded the Important Congressional Policy of Deterring Unauthorized Immigration by Rewarding Undocumented Aliens for Entering the United States Illegally.

Until IRCA's passage in 1986, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, was silent as to the employment of undocumented workers. Within this context, the courts were faced with interpreting whether the NLRA was intended to protect all workers regardless of immigration status and, if so, whether remedies would be available to all workers for violations of guaranteed statutory rights. The Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), contains two separate holdings. In reviewing these holdings, it is clear that while the NLRA applies to undocumented aliens, this application does not provide for reinstatement or backpay for any period when they were not lawfully entitled to be present and employed in the United States.

First, the Court in *Sure-Tan* ruled that the definition of "employee" under the NLRA included undocumented workers, 467 U.S. at 891-92, and that these workers could not be discriminated against because of their union activities. *Id.*

at 893-94. In coming to its first conclusion in *Sure-Tan*, the Court relied upon the NLRA's broad definition of the term "employee," as well as NLRB precedent holding that undocumented workers were employees within the meaning of the NLRA. *Id.* at 891. After finding that including undocumented workers within the coverage of the NLRA furthered goals of our national labor policy, the Court noted that it "[did] not find any conflict between application of the NLRA to undocumented aliens and the mandate of the [INA]." *Id.* at 892.

The Court noted that a "primary purpose in restricting immigration is to preserve jobs for American workers." *Id.* at 893 (citing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14)). In addition, the Court was concerned that if undocumented aliens were not protected by the NLRA, they would have to accept low wages and poor working conditions that would compete with those of unionized American workers. *Id.* at 892. Enforcement of the NLRA on behalf of undocumented workers, the Court reasoned, would help to assure that the competition of undocumented alien workers would not adversely affect the wages and employment conditions of lawful residents. *Id.* As additional support for its holding that undocumented aliens are covered by the NLRA, the Court found that the INA was principally concerned with terms of admission to the United States, and not with employment. *Id.* The Court observed that Congress did not make it unlawful for an employer to hire undocumented aliens, nor did it create a separate criminal offense for an alien to accept employment without authorization. *Id.* at 892-93. Therefore, the Court found that coverage of undocumented workers under the NLRA would not conflict with the INA. *Id.* at 893.[2]

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[2] This conclusion strongly suggests that the Court would have been more reluctant to include aliens within the statutory meaning of "employee" if the INA had contained employer sanctions then, as it does

In its second holding in *Sure-Tan*, however, the Court curtailed available remedies for undocumented workers. In examining the remedies available to the undocumented discriminatees who had left the country, Justice O'Connor stated in the majority opinion for the Court that the appellate court's formulation of a six-month minimum backpay award without regard to the employees' actual losses or legal availability for work exceeded the court's limited authority under the NLRA. *Sure-Tan*, 467 U.S. at 898-99. The Court held that, just as the NLRB's reinstatement order was conditioned upon legal reentry of the employees into the country, the employees must also be deemed "unavailable" for work during any period when they were not lawfully entitled to be present and employed in the United States. *Id.* at 902-05.

In requiring employees to show that they were "lawfully available for employment during the backpay period," *Id.* at 904, the Court reasoned that the NLRB could not simply disregard the "equally important" Congressional policies underlying the INA—the objective of deterring unauthorized immigration. *Id.* at 903. Otherwise, undocumented aliens would be rewarded by the NLRB for entering the United States illegally. A broader interpretation of the Court's holding suggests that awarding remedial backpay to undocumented aliens might encourage unauthorized immigration by sending a message to potential undocumented alien workers that they will be protected by American labor laws and that working conditions in this country will therefore be more attractive.

In the present case, the NLRB, just as it did in *Sure-Tan*, disregarded the "equally important" Congressional policy of deterring unauthorized immigration by rewarding undocumented aliens for entering the United States illegally and keeping their unauthorized status concealed by fraudulent

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now after the enactment of IRCA. *See* 8 U.S.C. § 1324a (employer sanction provisions).

means that clearly contravene the central purposes of IRCA. In computing backpay, as the Court has already clearly spoken to the issue at hand in *Sure-Tan*, the Court of Appeals erred when it failed to conclude that "Jose Castro" was unavailable for work during any period he was not lawfully entitled to be present and employed in the United States.

B. *Sure-Tan*'s Holding is Not Limited to Undocumented Aliens Who Have Departed the Country.

The Court of Appeals erred in concluding that *Sure-Tan* prohibits backpay remedies only to undocumented aliens who depart the country. The Court's discussion in *Sure-Tan* was not so narrowly constrained. Instead, the holding sweeps more broadly and denies backpay not only to those illegal aliens who are not legally present in the United States, but also to those who, like "Jose Castro," are not legally entitled to be employed in the United States.[3] The Court of Appeals "simply cannot convincingly evade the High Court's clear statement that 'in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United

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[3] Indeed, following the *Sure-Tan* decision, the NLRB General Counsel instructed that any undocumented worker hired after IRCA's effective date (November 6, 1986), would not be entitled to backpay or reinstatement unless the employee could file a form I-9 with the employer evidencing lawful immigration status. Memorandum from the NLRB General Counsel to Regional Directors *et al.*, 1988 NLRB GCM LEXIS 159, at *2, 1988 WL 236182 (Sept. 1, 1988) (expressing opinion that the NLRB "has not acquiesced to the view of the Ninth Circuit that reinstatement and backpay are appropriate where the discriminatees are physically, albeit unlawfully, present in the U.S."). Thus, until some courts were able to invent purported loopholes in *Sure-Tan*'s clear holding, even its critics believed that *Sure-Tan* meant what it said.

States.'" Pet. App. at 36 (*Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 657 (D.C. Cir. 2001) (*en banc*) (Ginsburg, J., dissenting) (citing *Sure-Tan*, 467 U.S. at 903)).

Moreover, even assuming, *arguendo*, that such an interpretation was plausible before the enactment of IRCA, such an interpretation is no longer reasonable. Prior to the passage of IRCA, the employment of undocumented workers was "peripheral" to the INA. *See Sure-Tan*, 467 U.S. at 892-93 (expressly relying upon the fact that Congress had not made the employment of an alien a separate legal offense). However, since the passage of IRCA, courts can no longer rely on this line of reasoning in applying *Sure-Tan* only to those undocumented discriminatees who have left the country.

II. AS A MATTER OF LAW, IRCA MAKES ALL UNDOCUMENTED ALIENS UNQUALIFIED TO WORK AND INELIGIBLE FOR BACK PAY.

A. The Court of Appeals Erred by Deferring to the NLRB.

In the present case, the Court of Appeals erred by deferring to the judgment of the NLRB. Although the Court must uphold the NLRB's factual findings if they are supported by substantial evidence on the record as a whole, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951), here, the NLRB was not entitled to deference because it has no authority to interpret or apply the immigration laws. Thus, the NLRB's decisions regarding the immigration laws are entitled to no deference whatsoever. *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1393 n.3 (9th Cir. 1986).

Furthermore, the NLRB's discretion is limited by the principle that it must "accommodate" the objectives of statutory schemes other than those of the NLRA when making a remedial order. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 39 (1942). Thus, the accommodation doctrine precludes the NLRB from issuing an order that would contradict a valid

federal statute in another area of law, such as our country's immigrations laws. Here, the NLRB's reinstatement and backpay order regarding an undocumented alien who is not entitled to employment in the United States conflicts with IRCA and, therefore, must be reversed.

B. IRCA Makes It Unlawful for an Employer to Hire an Undocumented Alien; Thus, It Bars the NLRB from Awarding Backpay to Undocumented Aliens.

IRCA's primary purpose was to combat illegal immigration. S. Rep. No. 99-132, at 1 (1985). IRCA was intended to stem the flow of illegal immigration into the United States by eliminating the magnet of employment for undocumented workers. *Id.* To achieve this purpose, IRCA makes it unlawful for an employer knowingly to hire "unauthorized aliens." 8 U.S.C. § 1324a(a)(1)(A). An "unauthorized alien" is one who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by [applicable federal law] or by the Attorney General." 8 U.S.C. § 1324a(h)(3). Thus, IRCA effected a monumental change in our country's immigration policy by criminalizing the hiring of unauthorized aliens.

To ensure, therefore, that employers do not hire unauthorized aliens, IRCA mandates that employers verify the identity and eligibility to work of each new-hire by examining specified documents before they begin work. 8 U.S.C. § 1324a(b). Employers who fail to do so, whether or not that failure resulted in the hiring of an unauthorized alien, are subject to civil penalties. 8 U.S.C. § 1324a(e)(5). If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired. 8 U.S.C. § 1324a(a)(1). Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed,

the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C. § 1324a(a)(2). IRCA specifically states:

> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an authorized alien with respect to such employment.

Id. Thus, IRCA statutorily disqualifies any undocumented alien from being employed as a matter of law.

Extensive study of the problem of illegal immigration indicates that the reason so many aliens come to the United States is the ease with which they can obtain employment. *See* H.R. Rep. No. 99-682, pt. 1, at 46-47 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650-51. Thus, one of IRCA's principal means of curtailing illegal immigration was the employer sanction provisions. *Id.* at 45, *reprinted in* 1986 U.S.C.C.A.N. at 5649-50. Employers who violate IRCA are punished not only by a series of civil fines, but are also subject to criminal penalties. These substantial sanctions for noncompliance may include: $250 to $2,000 per alien for the first offense; $2,000 to $5,000 per alien for a second offense; $3,000 to $10,000 for a third offense or more; and/or imprisonment for not more than six months for a pattern or practice of such violations. 8 U.S.C. §§ 1324a(e)(4); 1324a(f)(1).

IRCA's passage in 1986 was the product of a long process of information gathering and deliberation. *See* H.R. Rep. No. 99-682, pt. 1, at 51-56 (1986), *reprinted in* 1986 U.S.C.C.A.N at 5655-60. There was extensive debate and consideration on the issue of illegal immigration and its causes. *Id.* Civil rights organizations, concerned about potential discrimination against all "foreign looking or sounding persons," strongly opposed employer sanctions. G. John Tysse, *The Immigration Reform and Control Act of 1986* 2 (2d ed. 1988). Prior

decisions of this Court, *see* H.R. Rep. No. 99-682, pt. 1, at 69-70 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5673-74 (discussing *Examining Bd. v. Flores De Otero*, 426 U.S. 572 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973); and *In re Griffiths*, 413 U.S. 717 (1973)), also contributed heavily to the crafting of IRCA's final draft. Clearly, if Congress had wanted to "correct" the remedial holding of *Sure-Tan*, it would have done so expressly. Instead, the legislative history of IRCA demonstrates Congress' support of the Court's dual holding in *Sure-Tan*.

The House Judiciary Committee Report adopting the bill that eventually became enacted as IRCA states:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended [sic] to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in [*Sure-Tan*,] application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.

H.R. Rep. No. 99-682, pt. 1, at 58 (1986), *reprinted* in 1986 U.S.C.C.A.N. at 5662. *See also* H.R. Rep. No. 99-682, pt. 2, at 8-9 (1986) (Report of House Education and Labor Committee).

Thus, the legislative history of IRCA endorses the first holding of *Sure-Tan*, that undocumented aliens are employees within the meaning of the NLRA. In addition, the Committee did not disapprove of the part of the *Sure-Tan* decision holding that undocumented aliens are not entitled to backpay for periods when they are not lawfully present and employed in the United States. Hence, it was the Committee's preference that existing law be preserved, including the remedial holding of *Sure-Tan*.

In *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), the Court of Appeals for the Seventh Circuit in addressing *Sure-Tan*'s holding post-IRCA, held that undocumented aliens who are discharged in violation of the NLRA are not entitled to reinstatement or backpay as a matter of law. *Id.* at 1119. In *Del Rey Tortilleria*, the Seventh Circuit's holding applied to discharges of undocumented aliens occurring before the enactment of IRCA. After analyzing the *Sure-Tan* opinion at length, the Seventh Circuit concluded that the plain language of *Sure-Tan* barred undocumented aliens from receiving backpay. *Id.* at 1121. In addressing the then recently-enacted IRCA, the Seventh Circuit stated:

> Section 274A of IRCA, 8 U.S.C. § 1324a(a), makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment.

Id. at 1122.

Given Congress' unequivocal declaration that it is illegal to hire unauthorized aliens and its mandate that employers immediately discharge unauthorized aliens upon discovering their undocumented status, this Court cannot uphold the determinations of the D.C. Circuit and NLRB majorities in this case. To do so would sanction the formation of a statutorily declared illegal relationship, expose Hoffman—and other similarly situated employers—to civil and criminal

penalties, and illogically create an entitlement despite an undocumented alien having been statutorily disqualified from employment in the United States. To uphold the ruling below would nullify an important policy of IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.

III. SECTION 10(C) OF THE NLRA PROHIBITS THE NLRB FROM IMPOSING PUNITIVE REMEDIES; THUS, UNDOCUMENTED ALIENS MAY NOT RECEIVE BACKPAY UNLESS THEY CAN SHOW THAT THEY WERE LAWFULLY ENTITLED TO BE PRESENT AND EMPLOYED IN THE UNITED STATES.

Section 10(c) of the NLRA authorizes the NLRB to require a party in violation of the Act to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . ." 29 U.S.C. § 160(c). The backpay remedy under the Act is designed to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). However, in *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the Supreme Court interpreted Section 10(c) of the NLRA as precluding the NLRB from imposing punitive remedies. The Court stated in *Republic Steel*: "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes." *Id.* at 10. For these reasons, any backpay award to undocumented aliens, who have no entitlement to employment in this country, is punitive and not remedial in nature.

As the Seventh Circuit noted in *Del Rey Tortilleria*, the unstated premise behind *Sure-Tan's* holding is that an undocumented alien has not been legally harmed by a lay-off or termination because he "has not been harmed in a legal sense by the deprivation of employment to which he had no

entitlement." 976 F.2d at 1119 (citing *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986) (Beezer, J., dissenting in part)). An award of backpay cannot be remedial when there is no legally cognizable harm to remedy. Thus, backpay in such circumstances can only be seen as punitive. While it may promote the purpose of the NLRA to guarantee collective bargaining rights to every employee, including undocumented aliens, the award provisions of the NLRA are remedial, not punitive, in nature. Because the NLRA prohibits punitive remedies, backpay cannot be granted to undocumented aliens who are not entitled to employment and, thus, have suffered no legal harm.

IV. IN DEVISING REMEDIES, THE NLRA AND OTHER ANTI-DISCRIMINATION LAWS MUST BE CONSISTENT WITH IRCA.

In passing IRCA, Congress made difficult choices and drew careful lines to craft a cohesive national immigration policy with significant impact on employers. IRCA reflects that Congress struck a delicate balance between the need to control illegal immigration and the need of aliens authorized to work in the United States to find gainful employment. The decision below completely undermines the purpose and effect of this legislation.

The Government contends, as the Court of Appeals held below, that denial of backpay awards to aliens unlawfully present and working in the United States would eliminate any incentive for an employer to obey the requirements of the NLRA, and thereby encourage unscrupulous employers to hire undocumented aliens. They also contend that undocumented alien employees are unlikely to petition for redress of labor law grievances due to lack of an effective remedy. The

Court expressly rejected such an argument in *Sure-Tan* by noting that its decision—

> leaves intact the cease and desist order imposed by the Board, . . . one of the Act's traditional remedies for discriminatory discharge cases. Were petitioners to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act.

467 U.S. at 904 n.13. The Court further noted that if there remains "[a]ny perceived deficiencies in the NLRA's existing remedial arsenal," the proper solutions lies with "Congress and not the courts." *Id.* at 904 & n.13.

Indeed, Congress did act when it passed IRCA, which can impose civil and criminal sanctions upon employers who knowingly employ undocumented aliens. In addition, to address concerns that the employer sanction provisions would cause discrimination against some national origin groups, IRCA prohibits employers that have from four to fourteen employees, and are therefore not covered by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, from discriminating on the basis of national origin against U.S. citizens and nationals and non-citizens with work authorization. 8 U.S.C. § 1324b(a)(1). It also prohibits citizenship status discrimination and discriminatory documentary practices by all employers who have four or more employees. 8 U.S.C. § 1324b(a)(1)(B) and § 1324b(a)(6).

Moreover, an alien who has entered the country and obtained employment contrary to this country's immigration laws cannot complain when that employment is terminated since he or she had no legal right to that employment. Permitting backpay awards to such aliens has the effect of sanctioning the continuing violation of the law engendered by the undocumented alien's very presence in this country. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984). To do

so would illogically create an entitlement to a job despite having been statutorily disqualified from employment in the United States. Such a ruling would nullify IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.

The Court should clarify that under IRCA, undocumented aliens are not entitled to backpay under the NLRA—or any of the other federal anti-discrimination laws, such as Title VII, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, the Equal Pay Act, 29 U.S.C. § 206(d), and Section 503 of the Rehabilitation Act, 29 U.S.C. § 793. Such clarification is necessary, because the U.S. Equal Employment Opportunity Commission (EEOC) has borrowed the faulty reasoning of the NLRB and has issued guidance stating that in cases where an employer is found to have discriminated against undocumented aliens in violation of these federal anti-discrimination laws, the workers are entitled to the same relief as other victims of discrimination. *See* U.S. Equal Employment Opportunity Commission, *EEOC Guidance on Remedies Available to Undocumented Workers*, EEOC Compl. Man. (BNA) N:3255 (Oct. 26, 1999). *Compare with Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (*en banc*) (per curiam) (in consideration of effect of IRCA on the scope of Title VII, finding all undocumented aliens "unqualified" to work as a matter of law), *cert. denied*, 525 U.S. 1142 (1999).

While the undocumented status of workers is never justification for violating the federal labor and employment laws, the social costs of rewarding undocumented alien workers who have violated the law is too great to allow these workers backpay. The Court should not close its eyes to this serious violation of our federal immigration laws. To do so would encourage their continued violation and actually create an incentive to seek to gain employment using illegal

documents—and a windfall for those undocumented aliens who manage to conceal that fact from their employers for as long as possible.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge that the judgment below be reversed with the direction that at no time was "Jose Castro" ever legally present in the United States or legally entitled to work in this country; accordingly, under *Sure-Tan*, Castro was entitled to no backpay.

Respectfully submitted,

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No. 00-1595

IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief as *amicus curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

In its first decision in this case, the National Labor Relations Board found that Hoffman Plastic Compounds, Inc. "discriminatorily selected [four] union adherents for [a January 31, 1989] layoff" and, based on that finding, the Board issued a standard reinstatement and backpay order. *Hoffman Plastic Compounds, Inc.*, 306 NLRB 100, 100 & 101 (1992).

In the ensuing NLRB compliance proceedings, the NLRB General Counsel sought immediate reinstatement and full backpay for the discriminatees, including Jose Castro. D.C. Cir. App. 150. Hoffman Plastic's initial counter was that "[t]he backpay period for Jose Castro ended on or about March 10, 1989, the date that he was tendered a valid offer of reinstatement." D.C. Cir. App. 206. After the compliance hearing, at which Castro stated during his testimony that "he is not a citizen of the United States" and that "he works in the U.S. based on a birth certificate that is not his own," Hoffman Plastic added that, because of Castro's testimonial admission

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

of his "unauthorized alien" status, no backpay order would lie. *Hoffman Plastic Compounds, Inc.*, 326 NLRB 1060, 1060-61 (1998).

In its compliance decision, the Board treated with both of Hoffman Plastic's backpay defenses:

> • As to Hoffman Plastic's "reinstatement-offer" defense, the Board ruled that the Company's March 10, 1989 offer was not sufficiently definite to be a valid offer of reinstatement that cuts off backpay liability. 326 NLRB at 1061.
>
> • As to Hoffman Plastic's "unauthorized alien" status defense, the NLRB—following its leading decision in *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408 (1995), *enf'd*,134 F.3d 50 (2d Cir. 1997) and in light of Castro's testimonial admission of his "unauthorized alien" status—rescinded its order that the Company reinstate Castro and limited Castro's backpay so that it ran from the date of his discriminatory layoff and ended on the date on which Castro testified to his unauthorized alien status. 326 NLRB at 1061.

In petitioning for review of the NLRB's decision, Hoffman Plastic argues that because of Castro's "unauthorized alien" status, no backpay order will lie.

SUMMARY OF ARGUMENT

In unfair labor practice cases involving an employer's discriminatory discharge of an employee in violation of the National Labor Relations Act, the standard NLRA remedial order requires the employer to reinstate the employee and to make the employee whole for any wages or benefits lost as a result of the discharge. Obedient to this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the National Labor Relations Board limits this standard remedy in cases involving an employer's discriminatory discharge in violation of the NLRA of employees who have an "unauthorized alien"

status. In such cases, the Board conditions reinstatement on the employee's presentation to the employer of the authorization documents required by the Immigration Reform and Control Act of 1986 (IRCA). The Board also limits the backpay remedy to a period beginning on the date of discharge and ending either upon reinstatement consistent with IRCA or upon the employee's failure to present the necessary authorization documents within a reasonable period. Where, as here, the employer first learns of the discriminatee's "unauthorized alien" status after the discriminatory discharge, the Board treats this after-acquired evidence as grounds for denying reinstatement and for terminating the backpay period as of the date the employer first learned of the discriminatee's status.

Providing this limited backpay remedy in unfair labor practices cases involving an employer discriminatory discharge of "unauthorized alien" employees in violation of the NLRA furthers the purposes of the NLRA by dissipating the coercive effect of the discharge on the discriminatee's fellow workers and by deterring the employer commission of such unfair labor practices. And, this limited backpay remedy does not conflict with the immigration laws or encourage employers or "unauthorized alien" employees to take any action that is in violation of the immigration laws.

Contrary to Hoffman Plastic's submission, this Court's *Sure-Tan* decision does not preclude Board orders providing a backpay remedy to "unauthorized alien" employees. Rather, *Sure-Tan* instructs the Board, taking the immigration laws into account, to devise remedies attuned to the nature of the particular employer unfair labor practice against the "unauthorized alien" employees and the effect of the employer's wrongful act on the employees. The Board has heeded that instruction in divising its limited backpay remedy for an employer discriminatory discharge of an "unauthorized alien" employee.

ARGUMENT

"The [National Labor Relations] Act expressly authorizes the Board 'to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].' 29 U.S.C. § 160(c)." *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994). The Immigration Reform and Control Act of 1986 ("IRCA"), in its turn, makes it "unlawful . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in [IRCA] subsection (h)(3)) with respect to such employment." 8 U.S.C. § 1324a(1)(A).

In this NLRA unfair labor practice case—as in all its post-*A.P.R.A.* cases where the unfair labor practice is an employer discriminatory discharge in violation of the NLRA of an "unauthorized alien" employee—the NLRB took IRCA's employment provisions into account in fashioning a backpay remedy. The question presented is whether the Board, in fashioning the limited backpay remedy here, has taken proper account of IRCA and of the immigration polices IRCA embodies.

Hoffman Plastic argues that this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), holds that the immigration laws preclude NLRB orders providing for backpay in all cases involving employer unfair labor practices against "unauthorized alien" employees and that *Sure-Tan* thus requires the conclusion that the backpay order here is improper. The Company's argument rests on an erroneous reading of *Sure-Tan*.

Sure-Tan—which, it is important to note, arose in a distinct legal context at several removes from this case—most assuredly teaches two general lessons of import for all unfair labor practice cases involving employer discrimination in violation of the NLRA against "unauthorized alien" employees:

- *First*, "the NLRA [does] apply to unfair labor practices committed against undocumented aliens." 467 U.S. at 891.
- *Second*, "[i]n devising remedies for [such] unfair labor practices, the Board is obliged to take into account . . . the objective of deterring unauthorized immigration that is embodied in the [immigration laws]." 467 U.S. at 903.

Beyond those two points, *Sure-Tan* teaches a third lesson of import for the legally distinct *Sure-Tan* class of unfair labor practice cases and for that class of cases alone. Read to its limit, *Sure-Tan* goes only so far as to approve, as *a* proper means of taking account of the immigration laws, the court of appeals' ruling in that case—uncontested by either the employer or the Board in this Court— that backpay to unauthorized alien discriminatees is to be tolled during the period the discriminatees are unavailable for work *by reason of their deportation from the United States and their inability to lawfully reenter the country consistent with the immigration laws*. And, the *Sure-Tan* Court approved that ruling on the ground that it properly assures that the NLRB backpay remedy does not work at odds with the immigration laws *by encouraging the deported unauthorized aliens to commit a second violation of the immigration laws by illegally reentering the United States*. Nothing in *Sure-Tan* states, and nothing in its rationale suggests, that the Board, in devising remedies for employer unfair labor practices that do not accomplish the discriminatees' deportation must, to take proper account of the immigration laws, deny backbay.

Against that background, our argument is devoted to two points:

- We first review and discuss the Board's remedial rules for unfair labor practice cases that involve an

employer discharge in violation of the NLRA of "unauthorized alien" employees to demonstrate that the Board has properly heeded the *Sure-Tan* Court's admonition that "[i]n devising remedies for [such] unfair labor practices, the Board is obliged to take into account . . . the objective of deterring unauthorized immigration that is embodied in the [immigration laws]." 467 U.S. at 903.

- We then review in detail the *Sure-Tan* litigation and this Court's *Sure-Tan* decision to demonstrate that the Court's approval of a backpay tolling rule there pertained to the propriety of placing such a limit on that remedy in the legally distinct *Sure-Tan* class of unfair labor practice cases and *not* to the propriety of that limit on the backpay remedy in other classes of unfair labor practice cases involving "unauthorized alien" employees.

1. A. In *A.P.R.A. Fuel Oil Buyers Group, supra*, the NLRB addressed, for the first time, "the issue whether the language and legislative intent of IRCA conflict with or override [the Board's] statutory authority to remedy unfair labor practices and to exercise [its] judicially recognized discretion in determining what form such remedies should take." 320 NLRB at 411.

"After considering the many complexities of the policies underlying both statutes," the *A.P.R.A.* Board "conclude[d] that the most effective way for the Board to accommodate—and indeed to further—the immigration policies IRCA embodies is, *to the extent possible*, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees." 320 NLRB at 415 (emphasis added). At the same time, the *A.P.R.A.* Board was careful to "temper [the] traditional [NLRA] reinstatement remedy so that IRCA's provisions are satisfied," and to do so in a manner that complies with this Court's "admonition in *Sure-Tan* that the Board may not order remedies that entail conduct in violation of immigration statutes." *Id.*

The well-settled general NLRA remedial rule is that, "in all but a few cases involving discriminatory discharges . . . in violation of section 8(a)(3), the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay that he has suffered by reason of the discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420 n. 12 (1975)(internal quotation marks and citation omitted).

By its nature, the reinstatement order is a forward-looking injunctive remedy: it requires the employer to act to undo his earlier wrongful act—the discriminatory discharge—by offering the discharged employee reinstatement to the employee's former position in the employer's workforce. *See* 3 *NLRB Casehandling Manual* § 10529 (Sept. 1993) ("Reinstatement Offers"). The backpay order, by contrast, is a retrospective compensatory remedy: it does not require any corrective action by the employer but rather proceeds on the law of damages presumption that but for the wrongful discharge the discriminatee would have continued in employment and would have continued to receive the emoluments of employment, *see NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965)("The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer.), that is subject to rebuttal by proof that an intervening action or event would have resulted in a lawful interruption or termination of the discriminatee's continuing employment, *see* 3 *NLRB Casehandling Manual* § 10546 (tolling backpay during any period the discriminatee would have been otherwise unavailable for continued employment due, for example, to illness, *id.* § 10546.2, military service, *id.* § 10546.6, incarceration, *id.* § 10546.8, or travel outside the country, *id.*).

Given their different natures, the *A.P.R.A.* Board separately considered how to effectuate a proper intersection between

the NLRA reinstatement remedy and IRCA and then considered the proper intersection between the NLRA backpay remedy and IRCA.

The Board, first of all, "condition[ed] the Respondent [employer's] obligation to reinstate the[] individuals [who that employer had discriminatorily discharged in violation of the NLRA] on the individuals' production, within a reasonable time, of documents enabling the Respondent to meet its obligation under IRCA to verify their eligibility for employment in the United States." 320 NLRB at 408. Specifically, the employer was "ordered to offer [the undocumented alien] discriminatees . . . . reinstatement" only on the condition that the discriminatees "present, within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the Respondent [employer] to meet its obligations under IRCA." *Id.* at 415.

The *A.P.R.A.* Board then tempered the NLRA backpay remedy by

> order[ing] that the Respondent [employer] pay the employees backpay from the dates of their discharges to the earliest of the following: their reinstatement by the Respondent, subject to compliance with the Respondent's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States. [320 NLRB at 416.]

The Board explained that "awarding backpay to [undocumented alien discriminatees] effectuates the policies of the [National Labor Relations] Act" by "provid[ing] a measure of compensatory relief" to "employees [who] would have retained their jobs with the Respondent but for their union activities and the Respondent's unlawful retaliation for them." 320 NLRB at 415-416. The Board added that "the backpay [award], as limited by [the *A.P.R.A.*] decision,"

does *not* "induce the Respondent to illegally rehire the discriminatees in order to terminate its backpay liability." *Id.* at 416.

Finally, the *A.P.R.A.* Board made clear that in cases—such as the instant case—where the employer has hired and then discriminatorily discharged an employee in violation of the NLRA without, at either time, being aware that the employee has an "unauthorized alien" status, but thereafter becomes aware of the employee's status, the Board will apply its "after-acquired evidence" rule, 320 NLRB at 416 n. 44, which balances the Board's "responsibility to remedy unfair labor practices" against the employer's right to discharge an employee "at the time the employer acquire[s] knowledge of [the employee's] misconduct," *Axelson, Inc.*, 285 NLRB 862, 866 (1987).

In that light, the *A.P.R.A.* Board ruled that in the circumstances of the employer's after-the-fact discovery of a discriminatee's "unauthorized alien" status, the employer is *not* ordered to reinstate the discriminatee and the employer's backpay liability ceases at the time the employer first learns of the discriminatee's status.

At the same time, the *A.P.R.A.* Board also ruled that backpay would be awarded from the date of the discharge to the date the employer thereafter acquired evidence of the discriminatee's "unauthorized alien" status. The Board's rationale for awarding a limited amount of backpay in these circumstances is that "relieving the Respondent [employer] of all backpay liability, including that for the period when the Respondent had no knowledge of [the employee's status] and had no lawful reason to fire him, would provide an undue windfall for the Respondent." *John Cuneo, Inc.*, 298 NLRB 856, 856 (1990).[2]

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[2] In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), this Court approved an identical rule for Age Discrimination in

In sum, the Board, as the *A.P.R.A.* decision makes abundantly clear, has in the most careful and conscientious manner crafted NLRA remedies for cases involving employer discharges in violation of the NLRA of "unauthorized alien" employees that "take into account . . . the objective of deterring unauthorized immigration that is embodied in the INA [and in IRCA]." 467 U.S. at 903.

B. Where the NLRB has fashioned limited NLRA remedies that take account of "important Congressional objectives" reflected in a statute other than the NLRA, *Southern S.S. v. NLRB*, 316 U.S. 31, 47 (1942), the Board's determinations on remedy should stand as long as its remedial rules "effectuat[e] . . . the policies of th[e] Act," 29 U.S.C. § 160(c), and do not conflict with that other statute or rest on an incorrect assessment of the congressional objectives embodied therein. In the first regard there can be no doubt that the Board's limited backpay remedy for cases involving an employer discharge in violation of the NLRA of an "unauthorized alien" employee effectuates the policies of the Act and that a rule precluding backpay in all such cases would not.

i. As this Court recognized in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177 (1941), "Congress explicitly disclosed its purposes [in the NLRA by] declaring [in § 1] the policy which underlies the Act," *id.* at 182, and in NLRA § 10(c) Congress then "directs the Board 'to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act,'" *id.* at

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Employment Act cases on similar policy grounds. As the Court said there, "barring any recovery of backpay [for an employee who, prior to discharge, engaged in wrongdoing later discovered by the employer] would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination." *Id.* at 362.

187-188.[3] And, as stated in § 1 of the Act, Congress's "ultimate concern . . . was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce,'" and "[t]his vital purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.'" *Phelps Dodge*, 313 U.S. at 182, quoting 29 U.S.C. § 151. *See NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 265-266 (1938).

In implementing NLRA § 10(c) the Board has long recognized that among the "more significant[]" purposes served by providing back-pay to a discriminatee is "dissipat[ing] the deeply *coercive effects upon other employees* who may desire self-organization, but have been discouraged therefrom *by the threat to them implicit in the discrimination.*" *Ford Motor Co.*, 31 NLRB 994, 1099-1100 (1941) (emphasis added). "[A]nti-union discrimination exercises a coercive effect not only upon the immediate victim, but upon all present or future employees of the particular employer," because "it impresses upon them the

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[3] The use of the phrase "effectuate the policies of this Act" in NLRA § 10(c) as the touchstone for the Board's remedial authority reflects a conscious decision by Congress to "refer[] directly back to the statement of policies in section 1." *Memorandum Comparing S. 1958, 74th Cong., 1st Sess. with the Substitute for S. 2926, 73d Cong., 2d Sess.* 34 (1935), reprinted in 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1360 (1949). An earlier version of the proposal that was eventually enacted as the NLRA would have granted the NLRB authority to order persons found to have committed unfair labor practices to "take such affirmative action or perform any other acts that will achieve substantial justice under the circumstances." *Id.* The reason given for this change was that "[t]he phrase 'substantial justice' has no real significance in terms of the problems of this act, whereas the phrase 'effectuate the policies of this act' refers directly back to the statement of policies in section 1." *Id.*

danger to their welfare and security associated with membership in or activity on behalf of a labor organization." *Id.* at 1099.

The *in terrorem* effect of the employer's discharge of union supporters on their co-workers is not mitigated by the circumstance that the victims of unlawful employer retaliation are "unauthorized alien" employees. Nor is there a less "salutary effect" in providing backpay to the discharged "unauthorized alien" employee for that wrong as "assurance of the employer's future good faith not only to the discharged employee but to his fellow employees as well." *English Freight Co.*, 67 NLRB 643, 658 (1946).

It was for precisely these reasons that the *A.P.R.A.* Board thought it necessary "to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees." 320 NLRB at 415. The Board expressed concern that existence of a class of "powerless and desperate undocumented workers would certainly chill the American and authorized alien workers' exercise of their Section 7 rights." *Id.* at 414. And, the Board concluded that providing "a measure of compensatory relief" to undocumented workers, *id.* at 416, will demonstrate that "workplace abuses" cannot be committed with "relative impunity," *id.* at 414.

In addition, requiring an employer to make a discriminatee whole for his unlawful discharge "further[s] the public interest in deterring such discharges." *Mastro Plastics*, 354 F.2d at 175. By restoring the situation, "as nearly as possible, to that which would have obtained but for the illegal discrimination," *Phelps Dodge*, 313 U.S. at 194, the backpay remedy "prevent[s the employer's] enjoyment of any advantage which he has gained by violation of the Act," *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), and thus act as a "deterrence of unfair labor practices," *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969).

Conversely, without "the reasonably certain prospect of a backpay award," employers "have little incentive to shun practices of dubious legality." *Albemarle Paper*, 422 U.S. at 417.

All this is true where the discriminatee is an "unauthorized alien" employee. As the Board explains in its *A.P.R.A.* decision, awarding at least a limited amount of backpay to unlawfully discharged "unauthorized alien" employees works to deny the employer any "illegitimate economic advantage" stemming from the employer's unlawful conduct and, thus, "act[s] as a deterrent to such unprincipled and opportunistic employers." 320 NLRB at 414.

ii. So far as we are aware, the sole counterargument based on "the award provisions of the NLRA"—*viz.*, on NLRA § 10(c)—is that laid out by Judge Beezer in his dissenting opinion in *Local 512, Warehouse & Office Workers v. NLRB (Felbro)*, 795 F.2d 705 (9th Cir. 1986). *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992). Judge Beezer began from the premise that NLRA relief is "remedial, not punitive, in nature" and "should be awarded only to those individuals who have truly suffered harm." *Felbro*, 795 F.2d at 725 (Beezer, J., dissenting). It followed, in his view, that "[a]n alien who had no right to be present in this country at all, and consequently had no right to employment has not been harmed in a *legal* sense by the deprivation of employment to which he had no entitlement," and, there being no harm in this legal sense, that the Board cannot, consistent with NLRA § 10(c), award backpay. *Id.* (emphasis added).

The flaw in this statutory argument is that it fails to apprehend that "the proceeding authorized to be taken by the Board under the National Labor Relations is *not* for the adjudication of *private* rights." *National Licorice*, 309 U.S. at 362 (emphasis added). Rather, "[t]he immediate object of the proceeding is to prevent unfair labor practices which, as

defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act." *Id.* at 363. Thus, "[t]he power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices." *Automobile Workers v. Russell*, 356 U.S. 634, 642-643 (1958).

That being so, an employee's lack of personal "entitlement"—in the sense of a lack of a legal right to the job the employee in fact held and filled by doing the employer's work—does not stand in the way of ordering an employer who has discriminatorily discharged the employee to take affirmative remedial action in the form of backpay to the discriminatee as the Board deems "necessary to 'dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination.'" *Earle Industries, Inc.*, 315 NLRB 310, 316 (1994). *See McKennon v. Nashville Banner*, 513 U.S. at 362.

It is very much to the point that, in cases of an employer discriminatory discharge in violation of the NLRA, "[t]he employer is a wrongdoer" who has "acted out of a motive that is declared illegitimate by the statute." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). And, for the reasons we have just discussed, freeing the employer from responsibility for the economic con-sequences of his wrongdoing—because of some dereliction on the part of his victim that did not figure in the employer's wrongful action—disserves the "public interest in deterring such [wrongdoing]." *Mastro Plastics*, 354 F.2d at 175.

C. As we have seen, in cases involving the employer discriminatory discharge of "unauthorized alien" employees in violation of the NLRA, the NLRB has tempered its normal reinstatement and backpay remedy in order to take account of IRCA and of the overall policies of the immigration laws. And, as we have noted, where an administrative agency

proceeds by elaborating its organic statute in this manner, a reviewing court is called upon to decide whether the agency's "attempt to determine . . . to what extent those policies can be reconciled within the framework of the [agency's enabling] laws can[] be considered reasonable." *New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338, 1365 (D.C. Cir. 1988).

i. In considering whether the NLRB took proper account of the immigration laws in crafting its *A.P.R.A.* limited backpay remedy it is critical to recognize that nothing in IRCA, or in any immigration statute, expressly or implicitly, bars the provision of a backpay remedy to "unauthorized alien" employees for an employer's wrongful action against the employee in violation of a federal labor law. Nor can any claim be made that an employer would violate any provision of IRCA by making an administrative agency-ordered payment to an "unauthorized alien" employee in an amount that makes the employee whole for the harm worked by an employer action in violation of a federal labor law—such as a discriminatory discharge in violation of the NLRA. There is thus no "true conflict" between the *A.P.R.A.* limited backpay remedy for cases like this case and the immigration laws. *New York Shipping*, 854 F.2d at 1367.

ii. That being so the determination by the NLRB of the proper intersection between the NLRA and the immigration laws presents an occasion where the "agency is required by its own organic law to consider congressional policies articulated in other statutes," and to "explain why the action taken [by the agency] minimizes to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime." *New York Shipping*, 854 F.2d at 1367 & 1370.

In making that determination the *A.P.R.A.* Board began from the the entirely accurate understanding that, by "prohibiting employers from knowingly hiring or continuing to

employ undocumented aliens" in IRCA, "Congress intended to discourage employers from hiring undocumented aliens and thereby to gain control of the flow of illegal workers into this country." *A.P.R.A.*, 320 NLRB at 413 *citing* H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 46 (1986).

The Board then reasoned that "providing the aliens, once they are hired, the same protections, most prominently those provided under the National Labor Relations Act, afforded to American employees was the most effective means of eliminating the economic incentives for employers to hire undocumented aliens." 320 NLRB at 414. The Board's reasoning in this regard is unassailable. As this Court noted in *Sure-Tan*:

> If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. [467 U.S. at 893-894.]

In addition, the *A.P.R.A.* Board noted that leaving undocumented workers "powerless and desperate" in the face of employer unfair labor practices would tend to create a "ready supply of individuals willing to work for sub-standard wages in unsafe workplaces, with unregulated hours and no rights of redress," allowing "unscrupulous employers" to "turn away Americans and legally working alien applicants who hesitate to accept the same conditions." 320 NLRB at 414.

Again, the Board's reasoning resonates with this Court's recognition in *Sure-Tan* that "[a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893. Indeed, as the

Board noted, the Report on IRCA of the House Judiciary Committee quoted this passage from *Sure-Tan* in emphasizing that "[i]t is not the intention of the Committee that the employer sanctions provisions of [IRCA] be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal . . . labor relations boards . . . to remedy unfair labor practices committed against undocumented employees for . . . engaging in activities protected by existing law." H.R. Rep. No. 99-682 (I) at 58. *See also* H.R. Rep. No. 99-682 (II), 99th Cong., 2d Sess. 8-9 (1986).

iii. Finally, the *A.P.R.A.* Board emphasized that where an employer acts to terminate the employment of an "unauthorized alien" employee by discriminatorily discharging the employee in violation of the NLRA—and there is no other intervening action or event that makes the discriminatee unavailable for continued employment with the employer—an *A.P.R.A.* limited backpay remedy does not serve as an inducement or encouragement to the discriminatee or the employer to take any action violative of the immigration laws. In contrast to the *Sure Tan* "deportation" unfair labor practice cases, in "discriminatory discharge" unfair labor practice cases "the employees remain in the United States," and are thus available for continued employment with the employer and it "does not promote [violation of the immigration laws by encouraging] illegal entry," or otherwise, to provide a "backpay remedy [that] serves to place the employees for a limited time in the position that they would have been but for the Respondent's unlawful conduct." 320 NLRB at 416. "Nor does the backpay, as limited by [the *A.P.R.A.*] decision, induce the Respondent [employer] to illegally rehire the discriminatees in order to terminate its backpay liability." *Id.*

Conversely, as the Board noted, "the failure to order such a remedy in cases such as this"—a limited backpay remedy that does not conflict with the immigration laws or induce or

encourage actions violative of the immigration laws—"provides employers an incentive to disregard their obligations under Federal labor and immigration laws." *Id.* at 416 n. 43. *See McKennon*, 513 U.S. at 362.

2. As we noted at the outset, Hoffman Plastic's challenge to the NLRB backpay order in this case rests entirely on the categorical assertion that "*Sure-Tan* stands for the proposition that a worker who is not both lawfully present and legally authorized to obtain work in the United States may not receive backpay as compensation for a violation of the NLRA," Pet. Br. 5-6, an assertion that the Company rests on its reading of a single paragraph in Section IV A of the *Sure-Tan* opinion. Neither the *Sure-Tan* opinion as a whole, nor the Section IV A paragraph Hoffman Plastic cites, stand for the categorical rule that back pay orders will not lie in NLRA cases involving "unauthorized alien" employees.

A. *Sure-Tan* arose in 1977 at a time when the federal immigration laws addressed "the terms and conditions of admission to the country" but not "the employment relationship between an employer and an undocumented alien." 467 U.S. at 892 & 893 (internal quotation marks and citation omitted). The case implicated the proper relationship between the NLRA and the immigration laws, because the *Sure-Tan* employers were charged with violating the NLRA by discriminatorily reporting five of their employees as "unauthorized aliens" to the Immigration and Naturalization Service in retaliation for the employees' union activity—with the result that the INS arrested the five workers and, as an alternative to procuring a formal deportation order, had each of the workers execute an INS Form I-274, acknowledging his illegal presence in the United States and agreeing to immediately depart the country, which departure was effectuated on the very day of the arrest. *NLRB v. Sure-Tan,*

Inc., 672 F.2d 592, 599 (7th Cir. 1982).[4] Under the Immigration and Naturalization Act, these "unauthorized alien" workers could not lawfully reenter the United States unless and until the aliens secured the proper immigration documents.

In response to charges filed by the union, the NLRB General Counsel issued a complaint alleging that the *Sure-Tan* employers "caused the discharge of five employees by writing the Immigration and Naturalization Service and asking them to check their status which resulted in their deportation and that such action was motivated by the employees' support for the Union." *Sure-Tan, Inc.*, 234 NLRB 1187, 1191 (1978). That complaint generated a convoluted set of NLRB and court of appeals proceedings that focused on the proper remedy in an NLRA case in which the employer's unfair labor practice accomplished the deportation of the "unauthorized alien" discriminates.

i. In the first instance, the NLRB Administrative Law Judge concluded that the employers' "request to investigate the immigration status of its employees was motivated by its employees' support of the Union" and "that the discriminatees' subsequent deportation was the proximate result of the discriminatorily motivated action by [the employers] and constitutes a constructive discharge violative of Section 8(a)(3) and (1) of the Act." 234 NLRB at 191.

"Because the discriminatees were promptly deported to Mexico" and "because they were admittedly illegal aliens," the ALJ concluded that "the conventional remedy of backpay and reinstatement appears inadequate since being physically

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[4] The Form I-274 procedure "has been called a 'rough immigration equivalent of a guilty plea." *Conteras-Aragon v. INS*, 852 F.2d 1088, 1094 (9th Cir. 1988)(*en banc*). *See* 8 C.F.R. § 242.5 (1981)("Voluntary departure prior to hearing."). The vast majority of INS arrests result in the use of this procedure to effect a "voluntary deportation without a formal hearing." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

unavailable for employment nullifies any backpay liability and their inability to return to the United States renders reinstatement at best an unlikely prospect." 234 NLRB at 1192. Accordingly, the ALJ recommended that "a reinstatement order be expanded to a 6-month period." *Id.* While believing himself constrained to deny backpay altogether by "past Board precedent which tolls backpay where an employee is not available," the ALJ "invited [the Board] to consider awarding backpay for at least a minimum period of 30 days (or 4 weeks)." *Id.* at 1193.

ii. Ruling on cross-exceptions to the ALJ's decision, the NLRB sustained his finding that the *Sure-Tan* employers had "constructively discharged five of [their] Mexican employees in violation of Section 8(a)(3) of the Act." 234 NLRB at 1187. The Board concluded, however, that the ALJ had taken an "unnecessarily speculative" approach in recommending that the reinstatement order be held open for six months, "because he was of the opinion that the inability of the discriminatees to return to the United States rendered reinstatement 'at best an unlikely prospect,'" and in denying backpay, "because of his finding that the deported employees were physically unavailable for work." *Id.*

The Board noted that "[w]hile it is not disputed that the discriminatees were deported in February 1977, there is no evidence in the record that they have not returned to the United States." 234 NLRB at 1187. Accordingly, the Board decided to issue the "conventional remedy for a violation of Section 8(a)(3)"—an order requiring reinstatement with backpay—and explained that "[t]he appropriate forum for determining the issues relating to the[employees'] availability for work [would be the later] compliance proceeding." *Id.*

The NLRB General Counsel then moved for modification of the Board's order on the grounds that the order was "contrary to national immigration law and policy" in that it

"encourag[ed] deported discriminatees to return as quickly as possible to claim their jobs and backpay rather than wait until an uncertain date when they might be able to reenter the United States legally." *Sure-Tan, Inc.*, 246 NLRB 788, 788 (1979). The General Counsel suggested that the order be "clarified to require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully" and to provide for "backpay [that] accrue[s] only from the time a lawfully returned discriminatee is denied employment after his return." *Id.* The Board, over the dissents of two members, denied the General Counsel's motion on the ground that it was not "within [the Board's] authority to alter the obligations imposed by the Act in a manner which might assist in reaching whatever may be the current goals of immigration policies." *Id.*

iii. On the *Sure-Tan* employers' petition for review, the Seventh Circuit held that "the Board correctly concluded that Sure-Tan constructively discharged the[] five employees in violation of section 8(a)(3)." 672 F.2d at 602. The court of appeals went on, however, to modify the Board's order in two respects:

- *First*, the court of appeals placed conditions on the Board's reinstatement and backpay remedy. To ensure that the reinstatement order did not encourage the deported discriminatees to "enter the United States to claim the[proffered] jobs without proper documents," the court of appeals modified the order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement." 672 F.2d at 605-606. "Consistent with [this] requirement," the court also "modif[ied] the Board's order so as to make clear" that "in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Id.* at 606.

• *Second*, having limited reinstatement and backpay in those ways, the court went on to expand the Board's order in a different direction. To "afford the discriminatees a liberal but reasonable opportunity to reclaim their jobs," the court required that the reinstatement "offer should remain open for a period of four years" and that the offer be "delivered to the discriminatees in a manner allowing verification of receipt and . . . written in the discriminatee's native language (Spanish)." 672 F.2d at 606. And, to ensure that the discriminatees would receive at least some backpay, even if they did not lawfully return to the United States, the court "set[] a minimum period of six months during which backpay will be awarded in any event." *Id.*

B. After these proceedings the *Sure-Tan* case reached this Court on the employers' petition for *certiorari*. In deciding the case, this Court gave equal attention to the two novel substantive questions the case raised and to the novel remedial questions it also raised.

As to the substantive issues, the Court "first consider[ed] the predicate question whether the NLRA should apply to unfair labor practices committed against undocumented aliens." 467 U.S. at 891. Answering that question "yes," the Court stated that "[t]he Board has consistently held that undocumented aliens are 'employees' within the meaning of § 2(3) of the Act," and that "[t]he terms and policies of the Act fully support the Board's interpretation in this case." *Id.*

In addition to finding that "the Board's categorization of undocumented aliens as protected employees furthers the purposes of the NLRA," 467 U.S. at 892, the Court also found that "enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA," *id.* at 893. The Court explained that "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident

workers, any incentive to hire such illegal aliens is correspondingly lessened," and "if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws." *Id.* at 893-894.

The Court next "address[ed] the more difficult issue whether, under the circumstances of this case, petitioners committed an unfair labor practice by reporting their undocumented alien employees to the INS in retaliation for participating in union activities." 467 U.S. at 894. The difficulty is that "[t]he reporting of any violation of the criminal laws is conduct which ordinarily should be encouraged, not penalized." *Id.* at 895. But notwithstanding that, the Court concluded that it is "consistent with the polices of both the INA and the NLRA" for the Board to find an unfair labor practice "when the evidence establishes that the reporting of the presence of an illegal alien employee is in retaliation for the employee's protected union activity." *Id.* 895-896.

Only after having thoroughly considered these two substantive issues did the *Sure-Tan* Court, in section IV of its opinion, come to the "petitioners' challenges to the remedial order." 467 U.S. at 898. The Court framed its discussion of those issues by noting that the "[p]etitioners attack those portions of the Court of Appeals' order which modified the Board's original order by providing for an irreducible minimum of six months' backpay for each employee and by detailing the language, acceptance period, and verification method of the reinstatement offers," but that the petitioners did *not* "appear to challenge the court's modifications of the Board's remedial order conditioning acceptance of the reinstatement offers and the accrual of any backpay upon the discharged employees' legal presence in this country." 467 U.S. at 898 & n. 8. *See also id.* at 903 n. 12 (delineating which aspects of the court of appeals' remedial order were being challenged and which aspects were not).

Given what the petitioners put into dispute, Section IV A of the *Sure-Tan* opinion—which contains the paragraph on which Hoffman Plastic builds its case—is, in the Court's words, addressed to the following question:

> [whether] the Court of Appeals *impermissibly expanded* the Board's original order to provide that each discriminatee would receive backpay for at least six months on the ground that "six months is a reasonable assumption" as to the "minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice." 672 F.2d, at 606. [467 U.S. at 899. (emphasis added).] [5]

The *Sure-Tan* Court answered that question "yes," and did so on two grounds:

> • *First*, the Court held that the court of appeals had "overstep[ped] the limits of its own reviewing authority," and "usurped the delegated function of the Board to decide how best to appraise the relevant factors that determine a just backpay remedy." 467 U.S. at 900 & n. 10. The Court explained that NLRA § 10(c) "vest[s] in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Id.* at 898-899.
>
> • *Second*, the Court held that "the Court of Appeals' award of a minimum amount of backpay in [*Sure-Tan*] is not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees" in that

[5] Section IV B in its turn is addressed to whether the court of appeals "exceeded its limited authority of judicial review by modifying the Board's order so as to require petitioners to draft the reinstatement offers in Spanish and to ensure verification of receipt" and by "requir[ing] that the reinstatement offers be held open for four years." 467 U.S. at 905.

> "[t]he court's imposition of this minimum backpay award in the total absence of record evidence as to the circumstances of the individual employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA." 467 U.S. at 901.

After answering the question posed for decision at the outset of Section IV A, the Court, in the paragraph Hoffman Plastic invokes, considered the "portion of the Court of Appeals [*Sure-Tan*] remedial order" limiting the Board's original remedial order in that case "with which the Board has clearly indicated its agreement." 467 U.S. at 903, n. 12. In its entirety that paragraph states:

> Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings *must be conditioned upon the employees' legal readmittance to the United States.* In devising remedies for unfair labor practices, the Board is obliged to take into account another "equally important Congressional objectiv[e]," *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)—to wit, *the objective of deterring unauthorized immigration that is embodied in the INA.* By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. Cf. 3 NLRB Casehandling Manual §§ 10612, 10656.9 (1977). [467 U.S. at 902-903 (emphasis added; footnote omitted).]

The Court thus plainly instructed that the Board, in carrying out its "primary responsibility and broad discretion," 467 U.S. at 898, "in divising remedies for unfair labor practices, . . . is obliged to take into account the 'equally

important Congressional objectiv[e]' . . . of deterring unauthorized immigration that is embodied in the [immigration laws]," *id.* at 902-903. As we have stressed, the *A.P.R.A.* Board in divising limited remedies for the employer unfair labor practice of discriminatorily discharging "unauthorized alien" employees in violation of the NLRA, has responded to the Court's instruction by carefully and conscientiously taking into account the immigration laws' provisions and objectives, including those of IRCA which was enacted after *Sure-Tan* was decided.

But, contrary to Hoffman Plastic, the *Sure-Tan* Court did *not* go further and instruct the Board that it would be improper to provide for backpay in devising remedies, where the employer unfair labor practice accomplishes the discriminatory discharge of an "unauthorized alien" employee, that both effectuate the NLRA's policies and take proper account of the immigration laws. Rather, the Court, in approving the court of appeals' limitation on the *Sure-Tan* reinstatement and backpay order, confirmed that a backpay remedy would be improper where employer's unfair labor practice accomplishes the deportation of an "unauthorized alien" employee and a standard backpay order would serve as an inducement to the deported worker to illegally reenter the United States.

The point of the Section IV A paragraph in this regard as stated in its topic sentence is a point that goes only to the *Sure-Tan* class of cases: "[A]s the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States." 467 U.S. at 902-903.

The Board's original *Sure-Tan* reinstatement and backpay order, as the NLRB General Counsel pointed out, was "contrary to national immigration law and policy" in that it "encourag[ed] deported discriminatees to return as quickly as

possible to claim their jobs and backpay." 246 NLRB at 788. The cure, said the General Counsel, was to "require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully," and to provide for "backpay . . . accru[ing] only from the time a lawfully returned discriminatee is denied employment after his return." *Id.* On review of the Board's *Sure-Tan* decision, the court of appeals agreed with the General Counsel's assessment of the Board's original order and acted to limit the order as the General Counsel had suggested.

This Court, in its turn, approved of the court of appeals' action conditioning reinstatement "upon the employees' *legal readmittance* to the United States" on the ground that it properly furthers "the objective of deterring unauthorized immigration that is embodied in the INA." 467 U.S. at 903 (emphasis added). As indicated by the conjunction "similarly" between the two sentences in the *Sure-Tan* Section IV A paragraph discussing the limited reinstatement order and the single sentence setting forth the limited backpay order, the two limitations are *in pari materia* and this Court's ground for approving the latter is as one with its ground for approving the former. The condition on backpay is proper as a means of ensuring that a Board backpay order does not stand as an inducement to deported unauthorized alien discriminatees to reenter the country illegally.

All of this has to do with the proper NLRA remedy, that takes account of the immigration laws and their objectives, for employer unfair labor practices that accomplish the deportation of an "unauthorized alien" employee. None of it speaks to the proper NLRA remedy for employer unfair labor practices that accomplish the termination of an "unauthorized alien" employee's employment with the employer but not his deportation—where a limited backpay remedy, like the one the Board devised in it's *A.P.R.A.* decision does not conflict

with the immigration laws or their objectives or serve as an inducement to the discriminatee to take action violative of the immigration laws.

That the *Sure-Tan* Court did not mean to categorically preclude backpay orders for "unauthorized" alien discriminatees is shown by the Court's suggestion that "an appropriate period of backpay" could be fashioned on the basis of "evidence . . . as to the period of time the[] particular employees might have continued working before apprehendsion by the INS." 467 U.S. at 902 n. 11. Thus, for example, if the *Sure-Tan* employers had discriminatorily discharged the employees in violation of the NLRA *before* calling in the INS, the Court recognized that it would have been proper for the Board to award backpay for the period between the unlawful discharge and the employees' "apprehension by the INS." And, this would be so, even though the employees would not have been "lawfully entitled to be present and employed in the United States," *id.* at 903, during that period. *See Sure-Tan*, 246 NLRB at 791 (Member Murphy dissenting)(suggesting that "[o]ne possible way to meet the need for . . . reasonable accommodation [with the immigration laws] would be to limit the backpay period to the time from the date of discharge to the date of deportation").

This understanding of *Sure-Tan's* reach is reinforced by *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), which issued ten days after *Sure-Tan* and treats the remedial section of *Sure-Tan* as addressing a "[s]imilar[]" problem to the one presented in *Lopez-Mendoza*. 468 U.S. at 1047 n. 4.[6] *Lopez-*

[6] *Lopez-Mendoza* holds that the exclusionary rule, which applies in a criminal proceeding designed to "punish [the defendant's] past transgressions," does not apply to a deportation proceeding designed to prevent the unauthorized alien from engaging in his "continuing violation[]" of the immigration laws. 468 U.S. at 1046. In so holding, the *Lopez-Mendoza* Court explained that, while application of the exclusionary rule may prevent the punishment of the defendant's past transgressions and thus "allow the criminal to go free," *id.* at 1047, it should not "be invoked to prevent an agency from ordering corrective action," *id.* at 1046.

Mendoza explains that *Sure-Tan* drew on the distinction between "punish[ing] past transgressions" and "prevent[ing] their continuance or renewal" relevant to the exclusionary rule issue in *Lopez-Mendoza* in treating with proper remedial orders in unfair labor practice cases involving "unauthorized alien" discriminatees. 468 U.S. at 1046.

In the first place, *Lopez-Mendoza* explains that *Sure-Tan* allows the NLRB to impose "[r]*etrospective sanctions* against [an] employer" who was "guilty of an unfair labor practice in his dealings with an alien *notwithstanding the alien's illegal presence in this country*." *Id.* at 1047 n. 4 (emphasis added). The *A.P.R.A.* Board's limited backpay remedy for the employer unfair labor practice of discriminatorily discharging an "unauthorized alien" employee is just such a "retrospective sanction" that takes proper account of the immigration laws. In contrast, as *Lopez-Mendoza* also explains, under *Sure-Tan* "the employee is plainly not entitled to the *prospective relief* [of] reinstatement and continued employment" as long as "he maintains the status of an illegal alien." *Id.* at 1048 n. 4 (emphasis added).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,

Petitioner,

— v. —

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF EMPLOYERS AND EMPLOYER ORGANIZATIONS IN SUPPORT OF RESPONDENT

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42 pp

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American Nursery and Landscape Association

Associated Corset and Brassiere Manufacturers, Inc.

Greater Blouse, Skirt, Undergarment & Sportswear Association, Inc.

Levi Strauss & Co.

Industrial Association of Juvenile Apparel Manufacturers, Inc.

National Association of Blouse Manufacturers

New York Skirt and Sportswear Association, Inc.

Nicole Miller, Inc.

Plastic and Metal Products Manufacturing Association

San Francisco Small Business Advocates

San Francisco Small Business Network

Small Manufacturers Association of California

The United States Hispanic Chamber of Commerce

U.S.-Mexico Chamber of Commerce

Work in America Institute, Inc.

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This brief *amici curiae* is submitted on behalf of employers, industry associations, business networks, chambers of commerce, organizations of small manufacturers, and a business-labor coalition (collectively, the "Employer Organizations") to urge affirmance of the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit.[1]

INTEREST OF THE *AMICI CURIAE*

Amici and their members engage in business in a wide range of United States industries, including sectors that employ significant numbers of recent immigrants and other low-wage workers. *Amici* and their members include more than 45,000 companies located across the country.

This case arises against a backdrop of myriad federal and state laws governing labor relations, terms and conditions of employment, and immigration policy, each of which directly regulates the actions of *amici* and their members. The Employer Organizations have a vital interest in the outcome of this case, because the uniform application of legal rules to all employers is essential to the maintenance of a level playing field upon which *amici* can fairly compete.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of the brief. *See* SUP. CT. R. 37.6. Further, the Office of the Solicitor General, on behalf of the Respondent, and counsel for Petitioner Hoffman have granted consent for *amici curiae* to file this brief pursuant to SUP. CT. R. 37.2(a). *See* Letter from Sol. Gen. Theodore B. Olson to Jeffrey H. Drichta dated Dec. 6, 2001; Letter from Jeffrey H. Drichta to Maurice Baskin dated Nov. 27, 2001. Original copies of these consent letters have been filed with the Clerk of the Court contemporaneously with this brief.

Amici Employer Organizations have a powerful stake in assuring the imposition of consistent sanctions against any employer who attempts to reduce costs by skirting the law by, for instance, ignoring health, safety, environmental, consumer protection, wage and hour, or antidiscrimination laws, or by evading the requirements of the National Labor Relations Act ("NLRA") that are at issue here.

Amici Employer Organizations hold differing views about the appropriate types and levels of government regulation of business, and many *amici* are active in efforts to reform these costly and often inefficient rules. Nevertheless, the Employer Organizations and the companies they represent are responsible corporate citizens who endeavor to comply with the Nation's laws and business regulations as written, and whose businesses would be threatened by the increased, unfair competition from less responsible employers that would result if this Court reversed the holding below.

The amici Employers and Employer Organizations are:

American Nursery and Landscape Association ("ANLA"), founded in 1875, representing agricultural, service, and retail businesses that grow, sell, and use landscape plants. ANLA's 2,300 active member firms produce an estimated seventy-five percent of the United States' landscape plant material. Through the membership of state and regional associations, ANLA represents an additional 15,000 small and family farms and businesses. ANLA's chief purpose is to advocate the industry's interests before government on labor, employment, tax, environmental, trade, and related business issues. The wholesale value of nursery and greenhouse plants produced annually is estimated to exceed $12 billion. The industry employs an estimated 600,000 to 750,000 workers during

peak seasons. Greater than fifty percent of the peak-season workforce is believed to consist of immigrants.

Associated Corset and Brassiere Manufacturers, Inc., founded in 1933, representing girdle and brassiere manufacturers. The Association's members employ sample makers, cutters, sewing machine operators, and distribution workers. The clothing they produce is sold to large national department stores, discount stores, mail order houses, and specialty stores throughout the United States. Members are parties to collective bargaining agreements that require them to maintain high standards of wages and shop conditions.

Greater Blouse, Skirt, Undergarment & Sportswear Association, Inc., an association of contractors in New York's garment industry. Established in 1933, the members of the association are small to medium size entrepreneurs who produce garments for major jobbers and manufacturers in the industry. Most of the workers in this industry are recent immigrants. The membership of the association has declined in recent years because of severe competition from sweatshop contractors who constantly violate labor and other laws of the workplace.

Levi Strauss & Co. ("LS&CO"), one of the world's largest brand-name apparel manufacturers and marketers with sales in more than eighty countries. LS&CO products are sold under the Levi's®, Dockers®, and Slates® brands. LS&CO was founded in 1873 by Levi Strauss and Nevada tailor Jacob Davis. Today, the Levi's® trademark is one of the most recognized in the world and is registered in more than 160 countries. The company is privately held by descendants of the family of Levi Strauss.

Industrial Association of Juvenile Apparel Manufacturers, Inc., formed in 1936 to represent employers in the garment industry who specialize in the production of children's apparel and swimwear. The Association's

members have entered into collective bargaining agreements since its founding. The items they produce are sold to children's wear shops and to department stores like Wal-Mart, Kmart, and Sears. Members face stiff competition from contracting shops that engage in low-wage production.

National Association of Blouse Manufacturers, founded in 1933 to represent a number of women's clothing manufacturers in their labor relations, public relations, industry promotion, and governmental affairs. Its members have their merchandise produced in contracting shops that employ workers covered by collective bargaining agreements. Maintaining decent workplace standards is an important goal of the association and its members.

New York Skirt and Sportswear Association, Inc., founded in 1933 and representing manufacturers and jobbers who produce women's sportswear at their own facilities or in contracting shops. Members of the association supply their merchandise to major retail stores like Macy's, JC Penney, Kmart, and Sears. More than 15,000 workers (largely recent immigrants) are employed by contractors who produce garments for members of the association. Members face unfair competition from contractors who ignore labor, health, and safety standards.

Nicole Miller, Ltd., a world-class apparel design company. Nicole Miller designs for men and women are found in fine specialty retailers like Neiman Marcus, Saks Fifth Avenue, Bloomingdale's, Lord & Taylor, as well as over 1,200 boutiques across the United States. In a recent survey, eight out of ten women in the United States between the ages of twenty-five and fifty recognized the Nicole Miller brand. In addition to manufacturing, Nicole Miller owns and operates thirty retail boutiques.

Plastic and Metal Products Manufacturing Association, founded in 1936 to represent management in industrial relations, quality control, and workplace

environment issues. The association represents over 100 manufacturers of small plastic items. Association members abide by union contracts that guarantee minimum union standards and conditions. The members collectively employ over 8,000 workers, and they are vulnerable to competition from manufacturers who pay substandard wages.

San Francisco Small Business Advocates ("SFSBA"), a group of executives of small businesses based in San Francisco who operate on a national basis. The purpose of SFSBA is to advocate for small business on public policy issues on the local, state, and national levels. Among other initiatives, the organization has focused on energy policy in California and the implementation of the Workforce Investment Act in California and San Francisco.

San Francisco Small Business Network ("SFSBN"), founded in 1984 and comprised of nineteen diverse member organizations representing 19,000 small businesses. Member firms range from professional societies to nonprofit resource centers, from ethnic chambers of commerce to neighborhood business alliances. SFSBN advocates for legislation that promotes the success of small businesses and supports appointments of small business leaders to prominent policymaking positions, among other activities.

Small Manufacturers Association of California, a statewide association headquartered in Glendale, California, representing approximately 10,000 small manufacturing companies in California. The grass roots organization provides advocacy aimed at retaining and supporting the manufacturing base, and preserving manufacturing jobs, in the most populated state in the Nation.

The United States Hispanic Chamber of Commerce ("USHCC"), the preeminent Hispanic organization dedicated to representing, promoting, and advocating for the 1.2 million Hispanic owned businesses in the U.S. and Puerto Rico. In addition to actively promoting the economic

growth and development of Hispanic businesses, the USHCC serves as the umbrella organization for 200 local Hispanic chambers nationwide.

U.S.-Mexico Chamber of Commerce ("USMCOC"), a 501(c)(6), non-profit business association chartered in Washington, D.C. by distinguished Mexican and U.S. businessmen, with fifteen offices in the United States and seven offices in Mexico. Since 1921, the USMCOC has been fostering business, investment, and trade relationships between the United States and Mexico. The USMCOC represents more than 2,000 businesses in the United States and Mexico.

Work in America Institute, Inc., a non-partisan, not-for-profit organization dedicated to the advancement of productivity and quality of working life, and to promoting partnership between management and labor. Governed by a tri-partite Board of Directors representing major corporations, international labor unions, and the public sector, the Institute conducts research and produces public events in support of its mission. Since its founding in 1975, the Institute has served over 400 different organizations through its membership arm.

STATEMENT OF THE CASE

The background of this case is set forth fully in the briefs of the parties. Certain undisputed facts, however, underscore the importance of this case to fair business competition:

1. Petitioner Hoffman Plastic Compounds, Inc. ("Hoffman") does not dispute that it violated the NLRA, 29 U.S.C. § 151 *et seq*. (2001) and engaged in illegal layoffs. *See* Pet. App. at 6a.
2. Hoffman does not contest that one of the illegally laid-off workers had indicated on his employment application that he was not authorized to work in the United States. *See* Pet. App. at 94a-95a, n.10.
3. In fashioning a remedy for Hoffman's violation of the law, Respondent, the National Labor Relations Board ("the Board"), ruled that Hoffman was not required to reinstate this undocumented employee. *See* Pet. App. at 82a-83a.
4. The Board awarded the same type of backpay relief that it routinely awards in other cases where the NLRA is violated -- in this case, applying the after-acquired evidence rule to limit backpay to the period from the date of the unlawful layoff until the date when the worker testified that he was an undocumented immigrant. *See* Pet. App. at 94a-95a.

As discussed below, reversing the relief granted, on these facts, would provide law-breaking employers such as Hoffman an unfair competitive advantage over those who obey the law, a result that Congress specifically intended to avoid.

SUMMARY OF ARGUMENT

The rule urged by Petitioner Hoffman would be bad for business.

Fair competition would suffer if the decision below were reversed. *Amici* are law-abiding employers who honor labor and immigration laws, even as they strive to reform these regulations to reflect better sound business policy. Although many employers specifically object to backpay as a remedy for unlawful discharge under the NLRA, *amici* believe that as long as federal labor law recognizes backpay as a remedy, it would be folly to *carve out* an exception that exempts employers of undocumented immigrants from all backpay liability. Such an exemption would grant an unfair competitive advantage to outlaw "sweatshops" and other scofflaw businesses that hire undocumented workers, particularly in cost-sensitive, labor-intensive industries that depend upon low-skilled workers. It would advantage law breakers at the expense of law abiders. Eliminating backpay liability would also unfairly absolve the employer, alone, from responsibility, in a situation where both the employer and the employee have engaged in unlawful behavior -- a particularly inappropriate outcome in light of the significant adverse impact such a holding would have on business competition.

Fair competition was an objective of Congress when it adopted the specific labor and immigration laws at issue. The agencies that implement these statutes and the federal courts that interpret them have construed the laws to safeguard fair business competition as Congress intended. The decision below is consistent with these precedents. A contrary ruling that exempts employers of undocumented workers from the ordinary backpay liability that other employers face would undercut this Congressional objective. Given the framework of extensive government regulation of the workplace, *amici* caution the Court to refrain from

endorsing the message that businesses violating federal laws or regulations may compete unfairly with those who obey them.

ARGUMENT

I. THE LEGAL ANALYSIS OF THE SOLICITOR GENERAL IS CORRECT

Amici endorse the Solicitor General's reconciliation of federal labor and immigration statutes and their proper application to the facts of this case. For the reasons set forth below, *amici* contend that sound business policy also favors the construction of the relevant statutes that the Solicitor General advances.

II. FAIR COMPETITION REQUIRES THE UNIFORM APPLICATION OF REGULATORY STANDARDS

Fundamental principles of economics and fair competition weigh heavily against the creation of an exemption for employers of undocumented workers from ordinary backpay liability. Although estimates vary, there may be as many as thirteen million undocumented persons in the United States today, nearly all of working age,[2] and the NLRA should apply uniformly to all companies that employ them.

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[2] *Compare* U.S. Immigration and Naturalization Serv., THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION, 56 (1999) (estimating undocumented population at 4.6 to 5.4 million as of 1996), *with* Editorial, *Limited Amnesty for Immigrants*, CHICAGO TRIBUNE, Aug. 6, 2001 (estimating undocumented population at six million), *and* Cindy Rodriguez, *For Labor Activists, Unlikely Alliance*, THE BOSTON GLOBE, May 2, 2001, at B1 (eleven million in 2000), *and* Aaron Zitner, *Immigrant Tally Doubles in Census Count: U.S. Has Twice As Many Undocumented Workers As Estimated*, LOS ANGELES TIMES, Mar. 10, 2001, at A1 (thirteen million in 2000).

A. Regulation Imposes Costs That Must Be Applied Evenly for Competition to Be Fair

Basic economics teaches that a firm with a lower cost structure, over time, will be more successful than a firm with a relatively higher cost structure (all other factors being equal), in any price-competitive industry. With a lower cost structure, the successful firm will choose between matching the prices of the higher-cost firm (and achieving a lower overall market share) or undercutting prices (and achieving a higher overall market share). Either choice will result in higher revenues/profits for the low-cost firm relative to the high-cost firm.[3]

This economic principle holds true whether the successful firm achieves lower costs through greater efficiency or by evading costs of regulatory compliance. As one commentator has explained, the

> [d]irect benefits [of avoiding regulatory compliance] may be retained with the [firm]; alternatively they may be passed on [to] the customers in the form of lower prices. Either way they may produce indirect benefits in terms of product enhancement, increased market share, or other factors that affect profitability.[4]

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[3] *See, e.g.*, Thomas G. Krattenmaker and Steven C. Salopp, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 224 (1986) (noting that raising a rival's costs can be a particularly effective strategy that need not entail either a short-term sacrifice in profits or classical market power in order to succeed).

[4] Philip Saunders Jr., *Civil Penalties and the Economic Benefits of Noncompliance: A Better Alternative for Attorneys Than EPA's BEN Model*, 22 ENVTL. L. REP. 10003 (Jan. 1992).

When one firm gains a cost advantage by avoiding regulations, other existing competitors will suffer a systemic competitive disadvantage as a result, and will be forced either to exit the market or to adopt similar illegal tactics to replicate the lower cost structure of the successful firm in a perverse "race to the bottom" scenario.

Federal and state regulations impose significant costs on American companies that comply with the laws. By one estimate, federal regulations imposed an $843 billion cost of compliance on the American economy last year.[5] If so, this burden represents roughly eight percent of the Gross Domestic Product, or $8,164 for every American household.[6]

Federal workplace regulations -- including the NLRA, Immigration Reform and Control Act of 1986 ("IRCA"),[7] Fair Labor Standards Act ("FLSA"),[8] and Occupational Safety and Health Act,[9] -- are estimated to have imposed a cost on United States businesses of roughly $779 per employee in 2000.[10] Taking just unfair labor

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[5] *See* W. Mark Crain & Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, RFP No. SBAHQ-00-R-0027, at 1 (U.S. Small Bus. Admin. 2001).

[6] *Id.*

[7] 8 U.S.C. § 1324a *et seq.* (2001).

[8] 29 U.S.C. § 201 *et seq.* (2001).

[9] 29 U.S.C. § 651 *et seq.* (2001).

[10] *See* Crain & Hopkins, *supra*, at 3. According to another study, in 2000 the direct cost to the United States economy of compliance with the NLRA alone was between $3.95 and $30 billion. *See* JOSEPH JOHNSON, A REVIEW AND SYNTHESIS OF THE COST OF WORKPLACE REGULATIONS 19 (Regulatory Studies Program, Mercatus Center, George Mason University, Working Paper Aug. 2001).

practice cases closed by the NLRB, in 1999, the most recent year for which figures are available, employers paid more than $58 million in backpay to 22,669 employees, or roughly $2,600 per employee.[11] On average, small businesses (firms with fewer than twenty employees) face an annual burden from workplace regulations of an estimated $829 per employee, while large businesses (firms with more than 500 employees) face a cost of $698 per employee.[12]

Although *amici* seek to reform or eliminate many of these regulatory burdens -- including specifically the backpay remedy the Board may impose under the NLRA -- so long as such laws and regulations are in place, the costs of regulatory compliance must be borne evenly for competition to be fair. From an economic perspective, firms that avoid the costs of workplace regulation become lower-cost firms that, over time, will win in their competition against firms that obey the laws and thereby become higher-cost firms. Therefore, a precondition to any coherent set of workplace regulations in a competitive market economy must be equal application of the regulatory burden, in order to avoid advantaging law-breakers over law-abiders.

Simply put, uneven enforcement creates unfair economic advantages for those firms that, for whatever reason, are not required to comply with this Nation's regulatory regime. Whether a regulation is wise or foolish, so long as it is on the books, all employers should equally be required to obey it as a precondition to participation in the American economy.

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[11] *See* 64th Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 1999, at 113, Table 4.

[12] *See* Crain & Hopkins, *supra*, at 3.

B. The Competitive Significance of Even Regulatory Costs Is Well Documented

Congress, federal agencies, and the courts have recognized, in a variety of contexts, the principle that uneven enforcement of regulations will foster unfair competition. All three branches of government have acted to shape regulatory regimes so as to avoid unfair, discriminatory exemptions such as Hoffman now seeks to create.

To take one typical example, companies that fail to comply with the Nation's extensive environmental laws plainly obtain an economic benefit from doing so – sometimes achieving a considerable advantage over their competitors.[13] To avoid such an unfair advantage and maintain a " 'level . . . economic playing field,' "[14] Congress delegated to the Environmental Protection Agency ("EPA") and the courts the authority to recover from a violator any economic benefit obtained.[15] As a result:

> A cornerstone of the EPA's civil penalty program is recapturing the economic benefit that a violator may have gained from illegal activity. Recapture helps level the playing field by preventing violators from obtaining an unfair financial advantage over their competitors who made the necessary expenditures for environmental compliance.[16]

Within this framework, courts and the EPA regularly fashion remedies to protect fair competition from violators of the environmental laws.[17]

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[13] The EPA estimates that the cost of compliance with its regulations has risen from $30 billion (0.9 percent of GDP) in 1972, to as much as $185 billion (2.8 percent of GDP) in 2000. *See* Environmental Protection Agency, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 2-1 (1990) (all figures in 1990 dollars). *See generally* Richard B. Stewart, Symposium, *Environmental Regulation And International Competitiveness*, 102 YALE L.J. 2039, 2062-63 (1993).

[14] *United States v. Mun. Auth.*, 150 F.3d 259, 263-64 (3d Cir. 1998) (internal citation omitted).

[15] For example, the Clean Water Act, 33 U.S.C. § 1319(d) (2001), like other environmental laws, directs that sanctions against violators shall be based, in part, on any economic benefits "resulting from the violation."

[16] Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Notice, 64 Fed. Reg. 32,948 (June 18, 1999). *See also* EPA Science Advisory Board, Notification of Public Advisory Committee Meetings, 66 Fed. Reg. 19,770, 19,771 (Apr. 17, 2001) (identifying types of economic benefits a violator may obtain).

[17] For example, in *Mun. Auth.*, 150 F.3d at 262, a milk processor that made nearly 1,800 illegal discharges of wastewater because it "viewed the concomitant reduction in earnings as too high a price to pay for compliance with the Clean Water Act," was sanctioned with a fine that recouped the ill-gotten gain in order to "achieve the leveling of the playing field intended by Congress." *Id.* at 267. Other courts, in varying contexts, have similarly imposed penalties designed to remove any competitive advantage gained from violating environmental regulations. *See, e.g., United States v. Mac's Muffler Shop, Inc.*, Civ. A. No. C85-138R, 1986 WL 15443, at *10 (N.D. Ga. Nov. 4, 1986) (Clean Air case removing economic benefits of non-compliance); *Chesapeake Bay Found. v. Gwaltney*, 611 F. Supp. 1542, 1558 (E.D. Va. 1985) (same, under Clean Water Act).

Similarly, the EPA will waive a range of civil and criminal penalties for firms that promptly disclose environmental violations pursuant to voluntary self-audits, but the Agency retains "full discretion to recover any economic benefit gained as a result of noncompliance to preserve a 'level playing field' in which violators do not gain a competitive advantage over regulated entities that do comply." EPA: Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, Notice, 60 Fed. Reg. 66,706, 66,712 (Dec. 22, 1995) (final policy statement).

Other examples of this principle at work appear throughout the federal regulatory regime.[18] The impact on competition from uneven regulatory burdens is even reflected in the history of the Fair Labor Standards Act ("FLSA").[19] First enacted in 1938, this law sought to eliminate price competition based on unacceptable labor conditions by removing from the channels of interstate commerce goods produced by paying wages of less than twenty-five cents an hour, requiring more than forty-four hours of work per week without overtime pay, or utilizing child labor.[20] As originally enacted, however, the FLSA did not apply to a company as a unit, but instead specifically to those employees within a company who were engaged "in commerce or in the production of goods for commerce," as defined in the Act.[21] As a result, the application of the FLSA

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[18] For example, Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), exists to protect consumers from unfair trade practices, but the Federal Trade Commission acknowledges the need for uniform enforcement to prevent injury to competitors as well. *See, e.g.*, Letter from James C. Miller III, FTC Chairman, to the Hon. John D. Dingell, Chairman, U.S. House Committee on Energy and Commerce entitled "FTC Policy Statement on Deception," n.58 (Oct. 14, 1983) (*available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm). Indeed, in 1992, FTC Chairwoman Janet C. Steiger identified the need to safeguard "truthful competition" through uniform enforcement of the law as a core objective of the Commission's consumer protection program. *See* Press Release, Chairman Steiger Stresses Uniform Law Enforcement to Protect Both Consumers and Competition (Mar. 8, 1992) (*available at* http://www.ftc.gov/opa/predawn/F93/jds-dalla4.htm).

[19] 29 U.S.C. § 201 *et seq.* (2001).

[20] *See* Fair Labor Standards Act of 1938, ch. 676, § 2, 52 Stat. 1060 (1938).

[21] *See id.*

depended on the activities engaged in by particular employees, so that directly competing firms could receive different treatment under the Act depending on the structure of their workforces and their methods of production. A 1944 critique of the Act noted that this unequal coverage allowed the excluded segments of an industry to compete unfairly with those that were subject to the law's requirements.[22] Congress eliminated this unfair anomaly when it subsequently amended the FLSA to extend its provisions uniformly to every "[e]nterprise engaged in commerce or the production of goods in commerce."[23]

As these examples underscore, all branches of government have widely recognized the impact on business competition from uneven regulatory burdens, and they should be avoided absent a clear statutory mandate.

C. The Even Application Of Labor Regulations Is Particularly Significant In Competitive, Labor-Intensive Industries with Low Profit Margins

Price-competitive, labor-intensive industries are particularly at risk from any uneven application of regulatory burdens. Basic rules of economics, again, teach that unequal regulatory burdens will have the most severe impact in highly competitive industries with low entry barriers,

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[22] Harry Weiss, *Economic Coverage of the Fair Labor Standards Act*, 58 Q. J. ECON. 460, 472-73 (1944).

[23] 29 U.S.C. § 203 (2001). Congressional action was required because, unlike the NLRA, the statutory provisions of the FLSA required the disparate treatment. The NLRA, to the contrary, does not exempt employers of undocumented workers from its scope, *see* 29 U.S.C. § 152(3), and Congress has expressed its intent that the law should be applied uniformly to avoid unfair competition.

operating in price-sensitive markets where consumers base purchasing decisions primarily on price. In such industries, small cost variances can spell the difference between a firm's success or failure.

The anti-competitive impact of uneven regulatory burdens will thus be felt with special force in the very industries that typically employ large numbers of immigrants and low-wage workers. These tend to be low-profit industries that are highly competitive and labor-intensive, where low profit margins create huge incentives to gain every possible cost advantage.[24] In these markets, competitors such as *amici*, who play by the rules, will suffer at the hands of those who obtain even a small cost advantage through unequal regulatory burdens.

The garment industry is a typical industry. As the General Accounting Office has observed, the strong

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[24] A Congressional commission in the early 1980's noted that undocumented workers were concentrated in agricultural, textile, service and other low-wage industries. *See Closing the Back Door – The Need for Employer Sanctions, in* STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 559, 562 (U.S. Immigration Policy & The National Interest Apr. 30, 1981). More recent economic studies show that the largest percentages of immigrants, legal and illegal, work in low-skill jobs in the textile, manufacturing, agriculture, construction, and wholesale and retail trade industries. *See* George J. Borjas, et al., *How Much Do Immigration and Trade Affect Labor Market Outcomes?, in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY, NO. 1, at 9 (Brookings Institute 1997). *See also Statement of Ann L. Combs, Assistant Secretary of Labor for Pension and Welfare Benefits, et al., before U.S. House Subcomm. on Labor, Health and Human Services and Educ., Comm. on Appropriations* (May 23, 2001) (available at http://www.dol.gov/_sec/media/congress/052301workpro.htm) (low-wage industries such as agriculture, garment, healthcare, services, restaurants, and hotels/motels continue to employ immigrants).

incentives to gain even the smallest cost advantage has led some unscrupulous garment employers to skirt the law:

> Regarding economic factors, many of the experts we spoke with [noted] . . . the intense price-competitive dynamics of the garment industry . . . . The low domestic start-up costs allow easy contractor entry, ensuring manufacturers a large number of contractors bidding against each other for work. This competition is further heightened by the ability of retailers and manufacturers to import low-priced garments and the typical presence of an immigrant and primarily undocumented workforce, often with limited employment opportunities.[25]

Similar economic pressures exist in meatpacking and agriculture, which are also low margin, labor-intensive industries facing great pressure to control costs.[26] Like the garment industry, they are also industries where large numbers of undocumented workers are employed,[27] and thus

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[25] U.S. General Accounting Office, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 9-10 (Nov. 1994).

[26] *See* Alan Barkema, et al., *The New U.S. Meat Industry, in* FEDERAL RESERVE BANK OF KANSAS CITY, ECONOMIC REVIEW 33, 37 (2001) (available at http://www.kc.frb.org/publicat/econrev/PDF/2q01bark.pdf).

[27] The U.S. Department of Labor estimates that thirty-seven percent of all farmworkers in the U.S. are not legally authorized to work in this country. *See* U.S. Department of Labor, A PROFILE OF U.S. FARM WORKERS: DEMOGRAPHICS, HOUSEHOLD COMPOSITION, INCOME, AND USE OF SERVICES 1-5 (1997). The Immigration and Naturalization District Director estimated in 1999 that out of 220 meat packing plants in Iowa and Nebraska, twenty-five percent employ illegal immigrants. *See* Harry Valetk, *"I Cannot Eat Air!":*

(continued...)

industries where any uneven enforcement of the labor laws can create a huge competitive advantage.

The Second Circuit recently recognized these dynamics in a case arising in the building services industry, another price-sensitive sector with a low-wage, largely immigrant workforce. In *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*,[28] a Connecticut building services company alleged that a much larger competitor had "obtained a significant business advantage over other firms in the 'highly competitive' and price-sensitive cleaning services industry," by employing undocumented workers at less than the prevailing wage and failing to pay taxes or worker compensation insurance premiums.[29] Writing for the Second Circuit, Judge Leval reversed the district court's dismissal, concluding that the small firm had stated a RICO claim that by "illegally hiring undocumented alien labor, [defendant] was able to hire cheaper labor and compete unfairly . . . underbid[ding] the plaintiffs and tak[ing] business from them."[30]

In short, the adverse consequences for business competition that would follow from a reversal in this case are real and direct. Petitioner argues that reversal is warranted nonetheless because an affirmance would "reward" illegal entry and document fraud, and encourage

(continued...)

An Economic Analysis of International Immigration Law For The 21st Century, 7 CARDOZO J. INT'L & COMP. L. 141, 164 (1999).

28 --- F.3d ---, 2001 WL 1426953, No. 00-7571 (2d Cir. Nov. 15, 2001).

29 *Id.* at *1.

30 *Id.* at *5.

undocumented workers to stay.[31] As unappealing as this outcome may be (including to *amici* Employer Organizations), the result plainly is the lesser of two evils. However the Court rules, a wrongdoer will benefit: reversal rewards a rogue employer who violated the labor laws, while affirmance benefits an undocumented immigrant who worked in this country illegally. But, only a reversal will cause substantial competitive harm, while affirming the limited backpay remedy approved by the court below will have no similar adverse economic effect.[32]

The rule approved by the D.C. Circuit takes account of the wrongdoing by both sides, and fashions a remedy that effectively balances the equities without absolving either employer or employee. The relief ordered by the court does not include reinstatement to the illegally discharged worker, and grants him only limited back-pay. This is precisely the type of balancing approach this Court has taken in other labor cases, where employers have claimed they should be

31 Pet. Br. at 24-25. *See also* Brief of Amici Curiae Equal Employment Advisory Council et al. at 5-6.

32 Some have argued that affirming the *en banc* decision will encourage future illegal immigration by creating a "windfall" for undocumented workers who conceal their immigration status. *See* Brief of Amici Curiae Equal Employment Advisory Council et al. at 18-19. However, *amici* Employer Organizations are unaware of any evidence that the possibility of earning backpay for wrongful discharge under the NLRA has ever attracted illegal immigrants to America, and find the suggestion fanciful. *Cf. Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) ("We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job -- at any wage -- that prompts most illegal aliens to cross our borders"). The "windfall" to employers who avoid backpay liability by hiring undocumented employees, on the other hand, is beyond dispute.

excused from all liability for an illegal discharge because of an employee's own wrongful behavior.

For example, in *McKennon v. Nashville Banner Publ'g Co.*,[33] an employer argued unsuccessfully that its discovery of a worker's past wrongdoing, after the worker had been discharged and sued under a federal anti-discrimination statute, should extinguish all liability for the discharge.[34] Justice Kennedy disagreed on behalf of an unanimous Court, observing that the Court had previously "rejected the unclean hands defense where a private suit serves important public purposes."[35] The Court ultimately held that, in light of "both the deterrence and the compensation objectives" of the employment statute, "[i]t would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."[36] Rather, this Court approved the very after-acquired evidence rule that the Board applied in this case, and which Hoffman now strains to evade.[37]

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[33] 513 U.S. 352 (1995).

[34] *See id.* at 355-56.

[35] *See id.* at 360 (quotations and citation omitted).

[36] *Id.* at 359.

[37] *See id.* at 362-63. *See also ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317 (1994) (employee's false testimony under oath in NLRB wrongful discharge proceeding does not absolutely bar award of reinstatement with backpay); *see id.* at 325 (Kennedy, J. concurring) (noting that "[o]ur law must not become so caught up in procedural niceties that it fails to sort out simple instances of right from wrong and give some redress for the latter"). *See NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1884 (9th Cir. 1979) (Kennedy J., concurring) (enforcing NLRB order that included backpay for wrongfully discharged undocumented worker and explaining that "if the NLRA (continued...)

However distasteful it may seem to award limited backpay to an undocumented worker, the blanket immunity Hoffman seeks would be far more destructive, creating a new incentive to hire undocumented workers that does not currently exist and resulting in unfair business competition to *amici*.

III. FAIR COMPETITION IS A CONGRESSIONAL GOAL OF THE LABOR AND IMMIGRATION LAWS

Reversing the court below would not just be bad for business competition, it would be contrary to the intent of Congress when it crafted the Nation's labor and immigration laws. Congress has made plain its desire to maintain fair business competition through both the NLRA and IRCA, the specific statutes at issue here.

From the earliest days of the NLRA, this Court has underscored that both the public's right and the Board's duty under that Act "extend not only to the prevention of unfair practices by the employer in the future, but to *the prevention of his enjoyment of any advantage he has gained by violation of the Act.*"[38] One of the ways that Congress acted to avoid the potential for any unfair advantages under the NLRA was to impose from the outset a definition of an "employer" subject to the law that does not differentiate those who

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(continued...)
were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case").

[38] *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) (emphasis added).

employ undocumented workers from others.[39] Congress preserved this uniform application of the NLRA even as it acted to strengthen immigration control by imposing through IRCA separate sanctions on employers who knowingly hire undocumented workers.

In 1986, IRCA made it illegal for employers to "hire . . . an alien knowing the alien is an unauthorized alien."[40] IRCA sought to limit illegal immigration and to protect the domestic labor market, but it did not seek to diminish labor law protections or to create uneven regulatory burdens.[41] Rather, Congress and successive Administrations had been concerned about the deleterious impact on competition that employers who hired undocumented workers caused, and saw IRCA, in part, as necessary to remedy this problem.

Many years of consideration and study preceded the adoption of IRCA. In 1978, Congress created the Select

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[39] *See* 29 U.S.C. § 152(3) (2001) (exempting certain employers from NLRA coverage, not including employers of undocumented workers).

[40] 8 U.S.C. § 1324a(a)(1)(A) (2001).

[41] The legislative history of IRCA reveals that Congress never intended the new sanctions to weaken labor protections:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.

H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662.

Commission on Immigration and Refugee Policy ("SCIRP") to evaluate strategies that would address the problem of illegal immigration into this country. The impact of illegal immigration on fair business competition was never doubted. Testifying before SCIRP in 1980, one Carter Administration official explained that "employers who comply with statutory labor standards face unfair competition and are forced to compete with firms in the same industry who provide their employees less than the [labor law] requires."[42] The official further noted that employers had obvious economic incentives to hire undocumented workers, because they are typically paid substandard wages and do not complain about instances of economic exploitation due to the fear of detention and deportation.[43] Subsequently, President Reagan appointed the Administration Task Force on Immigration and Refugee Policy, chaired by Attorney General William French Smith, which reviewed the SCIRP recommendations and made recommendations that would form the basis for the Administration's overall immigration policy. In 1981, President Reagan announced an immigration and refugee policy that closely tracked the SCIRP recommendations.[44]

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[42] *Statement of Joe Razo, Director, Concentrated Enforcement Program, Division of Labor Standards Enforcement, U.S. Department of Labor, Before the Select Comm'n on Immigration and Refugee Policy*, at 1-2, Feb. 5, 1980, in STAFF REPORT OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY; APP. E, SUPPLEMENT TO THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY 243 (Apr. 30, 1981).

[43] *Id.*

[44] *See* Bernard D. Reams, Jr. and Mary Ann Nelson, *Immigration Reform And The Simpson-Rodino Act: A Legislative History Of The Immigration Reform And Control Act Of 1986 (P.L. 99-603) With*

(continued...)

IRCA was the legislative response to this situation. It was adopted, *inter alia*, to reduce illegal immigration by eliminating the "magnet" -- employment opportunities for undocumented workers -- that Congress believed attracted many illegal immigrants to the United States.[45] As a Reagan Administration official explained regarding a legislative precursor to IRCA, the Act would protect the welfare of low income workers because "[i]llegal immigration . . . depresses the wages and working conditions of low-skilled workers in this country."[46] Congress shared this goal for IRCA, explaining that the new law would address "both unemployment and less favorable wages and working conditions."[47]

This specific concern for low-wage workers voiced by Congress and the Administration, viewed from the perspective of an employer rather than a worker, is precisely a concern to protect fair business competition. The wages and working conditions of illegal immigrants threaten those of legal workers because law-abiding employers face unfair competition from those who hire illegal workers and then evade the rules governing the terms and conditions of employment. Congress recognized this inescapable fact. As Congressman Dan Lungren explained, rogue employers hire undocumented workers:

(continued...)

Related Documents And Secondary Sources, 22 INT'L J. LEGAL INFO. 12, 15 (1994).

45 *See* H.R. REP. NO. 99-682(I) (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649.

46 H.R. REP. 98-115 (I) at 96 (Statement of Robert W. Searby, Deputy Under Secretary for Int'l Labor Affairs, Dep't of Labor) (Mar. 16, 1983).

47 S. REP. 99-132 at 5 (1985).

> specifically so that they can exploit them. . . . [This] is unfair to the competitors in those industries, other employers, who follow the law and are undercut in their competitiveness by the fact that those are breaking the law and taking advantage.[48]

Congress sought to prevent such unfair business competition through IRCA in two ways: by imposing sanctions directly on employers who seek to gain an unfair cost advantage through the use of undocumented workers;[49] and, by increasing enforcement of laws governing the workplace, to remove any unfair cost advantage that might otherwise be gained by employers who hire undocumented workers and then disregard the NLRA and other laws governing the workplace.[50] Congress sought to increase labor law enforcement so as "to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."[51]

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48 *See* 132 CONG. REC. H10584, H10595 (Oct. 15, 1986) (remarks of Rep. Lungren). Rep. Lungren, the Ranking Member of the Immigration Subcommittee of the House Judiciary Committee, made his comments immediately prior to the final vote on IRCA on October 15, 1986. *See also* NANCY HOMEL MONTWEILER, THE IMMIGRATION REFORM LAW OF 1986, 514 (BNA 1986).

49 *See* 8 U.S.C. § 1324a (2001) (imposing penalties escalating from $250 to $10,000 on any employer who knowingly hires unauthorized workers).

50 *See* Immigration Reform and Control Act of 1986 § 111(d), Pub. L. No. 99-603, 100 Stat. 3359. Section 111(d) appropriated funds to the U.S. Department of Labor to enforce existing labor laws, including the FLSA, and thereby facilitated the Labor Department's pursuit of backpay awards for "unauthorized aliens." *See* 29 U.S.C. § 216(b) (2001).

51 IRCA § 111(d).

The federal regulatory agencies responsible for administering the labor and immigration laws also have recognized that avoiding an unfair competitive impact is one of the congressional objectives underlying these statutes. For example, the Immigration and Naturalization Service ("INS") and the United States Department of Labor, in a 1998 joint memorandum of understanding, recognized that "[l]abor law enforcement . . . helps foster a level competitive playing field for employers who seek to comply with the law."[52] The Equal Employment Opportunity Commission similarly has recognized that the enforcement of antidiscrimination laws against employers of undocumented workers furthers fair business competition.[53]

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[52] Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor, November 23, 1998, *reprinted in* 227 DAILY LAB. REP. E (Nov. 25, 1998). *See also Statement of John R. Fraser, Deputy Administrator Wage and Hour Division Employment Standards Administration U.S. Department of Labor Before the Subcommittee on Immigration and Claims of the House Judiciary Committee* (July 1, 1999) (*available at* http://www.house.gov/judiciary/ fras0701.htm) ("Labor law . . . helps foster a level competitive playing field for employers who seek to comply with the law").

[53] *See EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, Number* 915.002, *in* EEOC COMPLIANCE MANUAL § 622, APP. B (Oct. 26, 1999) (exempting employers of undocumented workers from backpay liability under federal anti-discrimination laws would "allow employers to profit from their own wrongdoing"); *id.* at n. 27 (backpay "level[s] the competitive playing field" among businesses) (*quoting A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 414 (1995)). In 1996, President Clinton signed Executive Order 12989, barring employers that knowingly hire illegal immigrants from receiving federal contracts. *See Economy and Efficiency in Government Procurement Through Compliance* (continued...)

Courts, too, have taken into account the congressional intent to promote fair competition, in construing and applying the labor and immigration laws. Indeed, this principle appears in *Sure-Tan, Inc. v NLRB*,[54] which recognized the necessity of applying the NLRA uniformly -- even when undocumented workers are involved -- in order to avoid the adverse impact on competition from undocumented immigrants who would otherwise not be subject to the standard terms of employment. Justice O'Connor observed for the Court in *Sure-Tan:* "If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened."[55] While the Court focused on the impact on the labor market ("acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens"), its reasoning underscores the need for uniform enforcement of the NLRA to avoid incentives for employers to compete unfairly by hiring undocumented workers.[56]

After enactment of IRCA, the Second Circuit similarly looked to the competitive impact to reconcile the provisions of IRCA with those of the NLRA. In *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*,[57] the court reviewed the legislative histories of both statutes in fashioning a

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(continued...)
with Certain Immigration and Naturalization Act Provisions, 61 Fed. Reg. 6,091 (Feb. 13, 1996) (Exec. Order No. 12,989).

[54] 467 U.S. 883, 893 (1984).

[55] *Id.* at 893.

[56] *Id.* at 892 (quotations and citations omitted).

[57] 134 F.3d 50 (2d Cir. 1997).

remedy that ensures "employers who comply with IRCA do not suffer a competitive disadvantage for their obedience to the law."[58] Other courts have likewise reconciled IRCA and the NLRA in order to achieve the legislative goal of a level competitive playing field, lest "[u]nscrupulous employers . . . be encouraged to hire undocumented workers for the competitive advantage that an environment relatively free of labor safeguards may offer."[59]

The decision of the court below is entirely consistent with these precedents in its efforts to protect fair business competition. *Amici* urge affirmance of the *en banc* decision of the D.C. Circuit, because it properly interprets the provisions of the NLRA and IRCA in a manner that promotes the even application of regulatory burdens. To reverse this result would create economic incentives for shady employers to violate the law, and subject law-abiding companies to the unfair competition that Congress, the courts, and the administrative agencies have consistently sought to avoid.

CONCLUSION

For the foregoing reasons, and in the interest of full and fair business competition, the *en banc* decision of the D.C. Circuit should be affirmed.

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58 *Id.* at 57.

59 *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 718-19 (9th Cir. 1986). *See also Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Ca. 1998) ("permitting employers to circumvent labor laws with regard to undocumented aliens . . . creates an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them"); *Patel*, 846 F.2d at 704.

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IN THE
Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND MAKE THE ROAD BY WALKING, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The American Civil Liberties Union Foundation ("ACLU") and Make the Road by Walking, Inc. ("MRBW") respectfully submit this brief *amici curiae* in support of Respondent the National Labor Relations Board and to urge affirmance of the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit.[1]

The ACLU is a national non-partisan organization of almost 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons, including immigrants. Through its national Immigrants' Rights Project, the ACLU engages in litigation and advocacy to ensure that immigrants receive the full protection of federal civil rights and labor laws.

MRBW is a membership-based community organization located in Bushwick, Brooklyn, one of New York City's poorest neighborhoods. Through its Workplace Justice Project, MRBW engages in organizing, litigation and advocacy to secure the labor and employment rights of low-wage workers.

STATEMENT

This case presents the questions whether the award of backpay by the National Labor Relations Board ("Board") to an undocumented immigrant worker is permitted under *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and the subsequently enacted Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359. *Amici* believe that the Board's award is fully consistent with *Sure-*

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Tan for the reasons set forth in the Brief of *Amicus Curiae* the AFL-CIO, and we do not further address that question here. *Amici* instead focus on the second question, namely whether IRCA, which penalizes employers who knowingly hire individuals not authorized to be employed under the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101 *et seq.*), limits the Board's discretionary power to impose backpay as a remedy for workers discharged in violation of the National Labor Relations Act, if the unlawfully discharged employee is an undocumented immigrant.

Congress enacted IRCA principally to curtail illegal immigration into the United States and to protect domestic workers from the perceived adverse effects of that immigration. IRCA's approach is to make undocumented workers less attractive to U.S. employers by reducing the economic incentives to hire them. As this Court noted in *Sure-Tan*, "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." 467 U.S. at 893. IRCA thus focuses on changing *employers'* behavior. The Board's award of backpay in this case furthers IRCA's aims, and Petitioner's argument to the contrary represents a fundamental misunderstanding of the statute.

SUMMARY OF ARGUMENT

IRCA was enacted after years of study and debate in Congress concerning unauthorized immigration and its impact on the domestic labor market. Congress ultimately concluded that unauthorized immigration could be prevented only by negating the economic incentives that unscrupulous employers have to hire undocumented workers, and not by attempting to reduce the attractiveness of U.S. jobs to foreign workers.

IRCA is designed to attack employers' incentives to hire undocumented workers through two mechanisms. First, the

"employer sanctions" provisions of the law, 8 U.S.C. § 1324a, impose civil penalties and criminal sanctions on U.S. employers who hire undocumented workers. Second, IRCA provided for increased enforcement of labor standards legislation on behalf of undocumented workers. Both mechanisms increase the cost of hiring undocumented workers and thereby make such workers markedly less attractive to U.S. employers. Directing employers to award backpay to illegally discharged undocumented workers has exactly the same effect, thus furthering IRCA's primary goal and complementing the statute's principal mechanisms for achieving that goal.

The Board's award of backpay in this case also furthers IRCA's aim of protecting the wages and working conditions of domestic workers. Congress concluded that the availability of easily exploitable workers—workers willing to accept subminimum wages and substandard working conditions—places downward pressure on the wages and working conditions of all workers. In order to address that concern, Congress endeavored to keep undocumented workers out of the United States, offered legalization to a large portion of the undocumented population present in the United States, and, critically, authorized increased enforcement of employment standards legislation on behalf of undocumented workers. Each of these mechanisms is designed to protect domestic workers by limiting U.S. employers' ability to take advantage of exploitable undocumented workers. Awarding backpay to undocumented workers similarly reduces their exploitability, and accordingly furthers IRCA's goal of protecting the wages and working conditions of domestic workers.

For over a century, Congress has legislated in the immigration area with an eye to American labor markets, often in order to protect the wages and working conditions of domestic workers. IRCA reflects longstanding congressional conclusions about the complex relationship between immigration—especially unauthorized immigration—and domestic labor, and the statute's goals and chosen mechanisms are

consistent with these past legislative initiatives. The Board's award of backpay in this case is consistent not only with IRCA, but with over a century of legislation aimed at protecting domestic labor from the perceived adverse effects of unauthorized immigration.

ARGUMENT

I. BACKPAY AWARDS FOR ILLEGALLY DISCHARGED UNDOCUMENTED WORKERS ARE CONSISTENT WITH IRCA'S AIMS OF CURTAILING ILLEGAL IMMIGRATION AND PROTECTING DOMESTIC WORKERS.

A. Congress Enacted IRCA To Address Unauthorized Immigration and Its Perceived Effects on Domestic Workers.

IRCA was the culmination of substantial study by Congress of the impact of unauthorized immigration on the United States and on the American labor market. The reports and analyses on which Congress based its actions frequently noted that "the adverse impact of illegal aliens was substantial, and warranted legislation both to protect U.S. labor and the economy, and to assure the orderly entry of immigrants into this country." H.R. Rep. No. 94-506, at 3 (1975).

In 1978, Congress created the Select Commission on Immigration and Refugee Policy ("SCIRP") to study immigration and recommend legislative responses. *See* Pub. L. No. 95-412, 92 Stat. 907 (1978).[2] The SCIRP's Final Report,

[2] Among the SCIRP commissioners was Senator Alan Simpson, later the Senate sponsor of IRCA. IRCA's sponsors in both the House and Senate stressed the special reliance that Congress placed on the SCIRP Final Report and the recommendations contained therein. In the final Senate debate on IRCA, Senator Simpson remarked that IRCA was "the basic work product" of the Commission. 132 Cong. Rec. S16611, 16614 (daily ed. Oct. 16, 1986). Likewise, Representative Mazolli, IRCA's sponsor in the House, commented that the SCIRP report "forms the outlines of the bill before this body today." 132 Cong. Rec. H9708, 9713 (daily ed. Oct. 9, 1986).

issued in 1981, noted that illegal migration to the United States is "extensive," and estimated that between 3.5 and 6 million undocumented residents lived in the United States in 1978. Senate and House Comms. on the Judiciary, 97th Cong., *U.S. Immigration Policy and the National Interest* 10, 36 (Joint Comm. Print 1981) ("*SCIRP Final Report*"). The Report further concluded that unauthorized immigration was having "serious adverse effects" on the American labor force, *id.* at 11, and that "the continuing flow of undocumented workers across U.S. borders has certainly contributed to the displacement of some U.S. workers and the depression of some U.S. wages," *id.* at 41.[3]

Following the release of the SCIRP Final Report, Senator Simpson and Representative Mazzoli introduced legislation in the 97th and 98th Congresses that ultimately led to the passage of IRCA. The House Judiciary Committee Report on H.R. 6514, the Immigration Reform and Control Act of 1982, summarized the impetus for the legislation as the need

[3] The impact of undocumented immigration on domestic labor is a matter of intense debate and controversy among economists. *Amici* express no view on the economic debate regarding the soundness of the Commission's findings. For a sample of competing views, see, e.g., Staff Report of the Select Commission on Immigration and Refugee Policy 509-10 & nn. 63-64 (1981) (citing Gilbert Cardenas, *Illegal Aliens in the Southwest a Case Study, in* National Council on Employment Policy, *Illegal Aliens: An Assessment of the Issues* (1976); Edwin Reubens, unpublished testimony before the Select Commission on Immigration and Refugee Policy (Oct. 29, 1979)). *See also* L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 2 Minn. L. Rev. 900, 904 n.24 (1988) (summarizing opposing views); Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 Case W. Res. J. Int'l L. 57, 72 (1998) ("Whether these immigrants benefit or burden society is a matter of dispute. At one extreme, people argue that aliens often fill jobs that U.S. citizens do not want, and they pay taxes without receiving benefits. The counterargument is that undocumented aliens increase unemployment for citizens and depress wages . . . .") (internal quotations and footnote omitted).

to "secure our borders" and to "protect our own workers from adverse competition in the labor market." H.R. Rep. No. 97-890, at 30-31 (1982).[4]

The 99th Congress picked up where the previous Congresses had left off. Senator Simpson introduced the Immigration Reform and Control Act of 1985 (S. 1200) and the Senate Judiciary Committee report on that bill again focused on the "adverse job impacts, especially on low-income, low-skilled Americans, who are the most likely to face direct competition" from undocumented aliens. S. Rep. No. 99-132, at 5 (1985). "Such adverse impacts," the Senate Report concluded, "include both unemployment and less favorable wages and working conditions." *Id.*[5]

These legislative initiatives culminated with the passage in 1986 of IRCA.

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[4] In its Report on H.R. 1510, the Immigration Reform and Control Act of 1983, the House Judiciary Committee included a statement by the U.S. Department of Labor that reflected the concerns and goals of the legislation. On behalf of the Department, the Deputy Under Secretary for International Labor Affairs wrote:

> I applaud your continuing efforts to achieve the pressing and long overdue reform of our immigration laws. . . . Illegal immigration . . . depresses the wages and working conditions of low-skilled workers in this country, and reduces their employment opportunities.

H.R. Rep. No. 98-115, pt. 1, at 95-96 (1983) (statement of Robert W. Searby).

[5] The Senate Subcommittee on Immigration and Refugee Policy conducted three days of public hearings on S. 1200. *See* S. Rep. No. 99-132, at 26. Representative Mazzoli's bill, H.R. 3810, was the subject of four days of hearings before the Subcommittee on Immigration, Refugees and International Law, which took testimony from 50 additional witnesses. *See* H.R. Rep. No. 99-682, pt. 1, at 56 (1986)

B. IRCA Aims To Curtail Illegal Immigration by Reducing U.S. Employers' Incentives To Hire Undocumented Workers.

Petitioner argues (Pet. Br. 22) that by awarding backpay to Castro, "the NLRB failed to properly account for the objectives of the immigration laws." To the contrary, the Board's action furthers IRCA's stated goal of reducing unauthorized immigration into the U.S. by deterring employers' from hiring undocumented immigrants.

IRCA sought to make undocumented workers less attractive to U.S. employers and thereby to reduce employers' incentives to hire such workers. Notably, IRCA focuses entirely on the need to change *employers'* behavior and motivations.[6] The statute does not adopt any new provisions that penalize undocumented immigrants for working in the United States or that seek to make U.S. jobs less attractive to foreign workers by making them more vulnerable to exploitation by unscrupulous employers. Indeed, Congress recognized that any such provisions would have the perverse effect of *increasing* employers' economic incentives to hire such workers. Therefore, IRCA enacted mechanisms that reduce the attractiveness of undocumented workers by making it more costly for U.S. employers to employ them. Awards of backpay, like the one ordered here, are a necessary and appropriate part of this overall approach and are thus entirely consistent with IRCA's approach to curtailing unauthorized

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[6] The Court of Appeals for the Second Circuit recognized this in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997), writing that "IRCA . . . demonstrates Congress's intent to focus on employers, not employees, in deterring unlawful employment relationships," *id.* at 56, and that "IRCA was passed to reduce the incentives for employers to hire illegal aliens," *id.* at 55. The Court of Appeals for the Eleventh Circuit reached the same conclusion in *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989), stating that "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens."

immigration. *Cf. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 57 (2d Cir. 1997) ("[P]recluding the [backpay] remedy would increase the incentives for employers to hire undocumented aliens.").

IRCA's statutory mechanisms for increasing the costs of hiring undocumented workers are twofold. First, employer sanctions make it illegal for employers knowingly to hire aliens not authorized to be employed. *See* 8 U.S.C. § 1324a(a)(1). An employer who hires such aliens is subject to an escalating series of fines, ranging from $250 to $10,000. *Id.* § 1324a(e)(4)(A). Criminal penalties and additional fines may be imposed on employers who engage in a "pattern or practice" of hiring undocumented immigrants. *Id.* § 1324a(f). These sanctions impose substantial economic risks on employers who hire undocumented workers, thus reducing employers' economic incentives to do so.

Second, IRCA explicitly authorizes funds for the U.S. Department of Labor's Wage and Hour Division to enforce employment standards laws on behalf of undocumented workers. *See* IRCA § 111(d). Congress recognized, as § 111(d) explicitly states, that such enforcement furthers IRCA's purpose by diminishing the incentive for employers to hire undocumented workers in order to take advantage of a more easily exploitable workforce. Section 111(d) reads:

> There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to *deter the employment* of unauthorized aliens and *remove the economic incentive* for employers to exploit and use such aliens.

Id. (emphasis added). The Wage and Hour Division enforces, among other employment laws, the Fair Labor Standards Act ("FLSA"), which requires covered employers to pay their employees the federal minimum wage, and to pay employees one and one-half times their regular rate of pay for overtime hours worked. *See* 29 U.S.C. §§ 202, 206, 207(a)(1). FLSA authorizes awards of backpay in cases of retaliation against employees who exercise their rights under the Act. *See* 29 U.S.C. § 216(b).

By enforcing employment laws such as FLSA on behalf of undocumented workers, the Wage and Hour Division drives up the cost of employing these workers and thereby reduces the economic incentives to hire them. When an employer is forced to pay his undocumented employees the same minimum wage and overtime pay as other workers, and when an employer is ordered to make a backpay award to an undocumented employee discharged for exercising his rights under FLSA, the economic incentives to hire such workers are reduced.[7] The backpay award ordered by the Board in this case achieves precisely the same effect and is, therefore, equally consistent with IRCA's goals and methods.

IRCA's legislative history further confirms Congress's decision to target employers' economic incentives to hire undocumented workers. The SCIRP Final Report found, for example, that border patrols and INS interdiction efforts were insufficient responses to undocumented immigration, and concluded that "the success of any campaign to curb illegal

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[7] Section 111(d) was not unprecedented in its appropriation for greater wage and hour enforcement on behalf of undocumented workers. In 1977, for example, Congress appropriated funds for 260 additional positions in the Wage and Hour Division "to strengthen enforcement of the Fair Labor Standards Act, including minimum wage and overtime provisions." S. Rep. No. 95-564, at 35 (1977); *see* Supplemental Appropriations Act, Pub. L. No. 95-240, 92 Stat. 107, 111 (1978); *see also* Richard E. Blum, Note, *Labor Standards Enforcement and the Results of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. Rev. 1342, 1361 (1988). According to the House Report supporting the appropriation, the funds were earmarked for investigations "directed at employers of undocumented workers" and "targeted in those industries with a high incidence of undocumented workers." H.R. Rep. No. 95-644, at 26 (1977). Congress felt that such targeted enforcement would help to "remove the economic incentive for employers to hire undocumented workers." *Id.*

migration is dependent on the introduction of new forms of economic deterrents." *SCIRP Final Report* at 59.[8]

When Congress turned to devising economic deterrents, it considered two distinct sets of economic incentives that accounted for unauthorized immigration. First, it noted the attractiveness of U.S. jobs to immigrant workers. *See* S. Rep. No. 99-132, at 1 ("The primary incentive for illegal immigration is the availability of U.S. employment . . . ."); H.R. Rep. No. 99-682, pt. 1, at 46 ("Employment is the magnet that attracts aliens here illegally . . . .").[9] Congress decided, however, that it could not legislate away the disparity between U.S. and foreign jobs. Even if wages for immigrant workers in the U.S. could be artificially lowered, for example, they would still exceed the wages available in the workers' home country. As the SCIRP Final Report observed, "however low the salaries of undocumented/illegal aliens in the United States, the studies indicate that their U.S. wages are many

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8 The Senate Report on IRCA similarly stated that:

> [a]ll objective, comprehensive studies of the problem of illegal immigration, including those by the . . . Select Commission on Immigration and Refugee Policy, have concluded that adequate enforcement of U.S. immigration laws cannot be achieved by direct enforcement alone. The Committee agrees.

S. Rep. No. 99-132, at 8; *see also* S. Rep. No. 98-62, at 7 (1983) ("adequate enforcement of U.S. Immigration laws cannot be achieved by direct enforcement alone"); S. Rep. No. 97-485, at 7 (1982) (same).

IRCA does contain some standard immigration enforcement measures designed physically to prevent unauthorized entry into the United States. Section 111(a) of the law calls for "an increase in the border patrol and other inspection and enforcement activities of the Immigration and Naturalization Service and of other appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States." IRCA § 111(a)(1). Section 112 enacts criminal penalties for those who illegally transport aliens into the United States. *Id.* § 112.

9 Similarly, the SCIRP Final Report recognized that "[t]he vast majority of undocumented/illegal aliens are attracted to this country by employment opportunities," *SCIRP Final Report* at 59, and concluded that "[t]he attraction of what are usually lower status but higher paying jobs in the United States is powerful," *id.* at 37.

times that of previous wages in the home country." *SCIRP Final Report* at 37.

Similar conclusions emerged during floor debates on IRCA. Senator Simpson, for example, explained the futility of attempting to flatten the disparity between U.S. and foreign job conditions:

> The most generous aid program which Congress might ever pass is unlikely in the foreseeable future to reduce sufficiently the large wage differentials which now exist. U.S. wages are often 10 or 15 times as high.

131 Cong. Rec. S11242, 11258 (daily ed. Sept. 11, 1985). Accordingly, Congress did not try to reduce the attractiveness of U.S. jobs to immigrant workers or to impose new or special penalties on immigrant workers by, for example, reducing the protections to which they are entitled.[10]

In addition to considering the appeal of U.S. jobs to foreign workers, Congress looked at the attractiveness of foreign workers to U.S. employers. It believed that U.S. employers had economic incentives to hire undocumented workers because they "are vulnerable to exploitation" and that "employers prey on their fear." 132 Cong. Rec. H9708, 9712 (daily ed. Oct. 9, 1986). Congressman Rodino stated that when an undocumented employee's "employer shortchanges [him], or doesn't pay [him] for overtime, or pays [him] less than minimum wage, [he] will complain to no one." *Id.* at H9709. Congressman Lungren noted that IRCA was directed at employers "who have hired illegal aliens specifically so that they can exploit them." 132 Cong. Rec.

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10 The SCIRP also considered but explicitly rejected the suggestion that "penalties must be imposed on those aliens who work illegally in the United States if illegal entry is to be effectively discouraged." *SCIRP Final Report* at 65-66. Anticipating Congress's decision in IRCA not to pursue such an approach, the Final Report concluded that "the imposition of penalties, in addition to that of deportation, is unnecessary and unworkable." *Id.* at 66.

H10583, 10596 (daily ed. Oct. 15, 1986). And in his supplemental statement to the SCIRP Final Report, Senator Kennedy (one of the SCIRP Commissioners) made clear that "[p]art of the incentive to hire undocumented aliens is their willingness to accept substandard wages and working conditions." *SCIRP Final Report* at 361.

Unlike efforts to make U.S. jobs less attractive to immigrant workers, which Congress considered futile, Congress decided that legislation aimed at reducing *employers'* economic incentives to hire undocumented immigrants was more likely to achieve the desired end.[11] Therefore IRCA aimed to negate these economic incentives. The Select Commission's Final Report concluded that Congress should make undocumented workers more expensive to U.S. employers:

> Without an enforcement tool to make the hiring of undocumented workers *unprofitable*, efforts to prevent the participation of undocumented/illegal aliens in the labor market will continue to meet with failure.

Id. at 62 (emphasis added).

Congress crafted just such an enforcement tool by enacting employer sanctions:

> The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

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11 During the 92d Congress, the House Judiciary's immigration subcommittee related a similar conclusion. A summary of the hearings held by the subcommittee states that "the U.S. employer, unlike the illegal alien, is amenable to deterrence—vis a vis—economic and criminal sanctions." Subcommittee No. 1 of the House Comm. on the Judiciary, 93d Cong., *Illegal Aliens: A Review of Hearings Conducted During the 92d Congress* (Serial No. 13, pts. 1-5) at 22 (Comm. Print 1973).

H.R. Rep. No. 99-682, pt. 1, at 46.[12]

In addition, Congress sought to deter employers from hiring undocumented workers by directing the vigorous enforcement of employment laws on behalf of those workers. The House Education and Labor Committee report makes clear that Congress intended the full panoply of the Nation's labor and employment laws, *including the National Labor Relations Act*, to be enforced on behalf of undocumented workers:

> [T]he committee does not intend that any provision of this Act would limit the powers of State and Federal labor standards agencies such as the . . . Wage and Hour Division of the Department of Labor, . . . the National Labor Relations Board, . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. *To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees* and the depressing effect on working conditions caused by their employment.

H.R. Rep. No. 99-682, pt. 2, at 8-9 (1986) (emphasis added).

Senator Kennedy, who introduced the amendment that eventually became § 111(d), *see* S. Rep. No. 98-62, at 29, likewise concluded that enforcing labor standards legislation on behalf of undocumented workers would help reduce illegal immigration:

> We must . . . intensify the enforcement of existing [labor standards] laws. . . . Vigorous and effective enforcement of these laws will reduce the incentive for employers to hire undocumented workers.

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12 The Report also noted that "it is the Committee's belief that by and large most employers will desist from hiring undocumented aliens when it is known that civil and criminal penalties will attach to such activity." *Id.* at 59.

SCIRP Final Report at 361.[13] Senator Simpson echoed this view during hearings on IRCA by stating that "[w]e are all aware that the answer to illegal immigration rests with increased border enforcement, and increased labor law enforcement." *Immigration Reform and Control Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong. 27 (1985). Section 111(d) thus embodies the Congressional view that undocumented immigration will be curtailed by the full enforcement of labor standards laws on behalf of undocumented workers.

Accordingly, vigorous enforcement of the labor laws on behalf of undocumented workers is not only consistent with the immigration laws in general, it is part and parcel of IRCA's approach to curtailing unauthorized immigration. An award of backpay in the circumstances presented here is necessary to furthering IRCA's goals and acts as a complement to the statute's mechanisms for achieving those goals.

C. IRCA Attempts To Protect Domestic Workers by Reducing the Availability of Exploitable Immigrant Workers.

In addition to adopting new mechanisms to curtail unauthorized immigration, IRCA aims to protect domestic workers from the downward pressure on wages and working conditions that Congress believed was caused by the availability of exploitable undocumented workers. IRCA therefore tried to reduce the presence of such exploitable, undocumented workers in the workforce by reducing employer incentives to hire them, by legalizing some undocumented immigrants, and by enforcing employment standards legislation on behalf of those undocumented workers who find employment in the

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13 The SCIRP Final Report called for "the increased enforcement of existing wage and working standards legislation." *SCIRP Final Report* at 70.

United States.[14] Awards of backpay such as the one at issue here similarly reduce the exploitability of undocumented workers, and therefore are consistent with IRCA's approach to protecting domestic workers.

First, as discussed above, IRCA responded to the availability of exploitable undocumented workers by seeking to eliminate employers' incentives to hire such workers and thereby to minimize the number of undocumented workers in the workforce. *See supra* pp. 7-14.

Second, IRCA enacted a special legalization program for some undocumented immigrants to, *inter alia*, reduce the pool of exploitable undocumented workers. Section 201 of IRCA established a process by which immigrants who had been in the United States in undocumented status for the requisite number of years could apply for temporary resident status and eventually permanent resident status. *See* 8 U.S.C. § 1255a. IRCA's legislative history makes clear that one goal of the legalization program was to protect domestic workers. The SCIRP Final Report recommended a program to "legalize a substantial portion of the undocumented/illegal

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14 Several other provisions of IRCA reflect Congress's concern with the impact of immigration on domestic workers. The statute created a new nonimmigrant subcategory, H-2A, for the admission of foreign temporary agricultural workers. *See* IRCA § 301. That provision, now codified at 8 U.S.C. § 1188, conditions approval of H-2A petitions on certification that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* § 1188(a)(1)(B). Moreover, Title IV of the law requires the President to submit a number of reports to Congress, several of which pertain to the impact of immigration on domestic workers. *See* IRCA §§ 401-406. Section 402 calls on the President to provide Congress with annual reports on the implementation of the employers sanctions provision codified at 8 U.S.C. § 1324a. The reports were to contain "an analysis of the impact of the enforcement of that section on—(A) the employment, wages, and working conditions of United States workers . . . ." IRCA § 402(3)(A). Section 403 requires a similar report regarding the impact of the H-2A program on "the wages and working conditions of United States agricultural workers." *Id.* § 403(a)(3).

aliens now in our country" because "[l]egalizing those who have settled in this country and who are otherwise qualified will have many positive benefits for the United States as a whole. . . . No longer exploitable at the workplace, [they] no longer will contribute to depressing U.S. labor standards and wages." *SCIRP Final Report* at 12-13.[15] The Senate Judiciary Committee report made the same point:

> through legalization . . . [we seek] to eliminate the illegal subclass now present in our society. . . . [T]heir illegal status and resulting weak bargaining position cause these people to depress U.S. wages and working conditions.

S. Rep. No. 99-132, at 16 (1985).[16]

Third, and critically, IRCA attempts to prevent the exploitation of undocumented immigrants who are nonetheless employed in the United States. IRCA accomplishes this purpose in the same way that it negates employers' incentives to hire undocumented workers: by enhancing the enforcement of employment standards legislation on behalf of undocumented workers. The text of § 111(d) makes clear that Congress intended this enforcement to prevent the exploitation of undocumented workers. *See* IRCA § 111(d) (funding enforcement to "remove the economic incentive for employers *to exploit* . . . [undocumented] aliens" (emphasis added)).

The legislative history of § 111(d) confirms that Congress intended to enforce labor standards legislation on behalf of undocumented workers in order to protect domestic workers. The SCIRP Final Report, for example, called for "increased enforcement of existing wage and working standards legislation" in order to ensure that immigration reform "results in the improvement of wages and working conditions for those authorized to work in the United States." *SCIRP Final Report* at 70. Specifically, the Report supported budgetary increases to allow the Department of Labor Employment Standards Administration "to increase its efforts to monitor the workplace." *Id.*

Similarly, the House Education and Labor Committee report, quoted above (*see supra* p. 13), concluded that failing to enforce such legislation or limiting the remedies for violations of these laws would be "counterproductive" of IRCA's "intent to limit the hiring of undocumented employees *and the depressing effect on working conditions caused by their employment.*" H.R. Rep. No. 99-682, pt. 2, at 8-9 (emphasis added). In addition, the House Judiciary Committee stressed its intention that employment and labor laws, including the National Labor Relations Act, be enforced on behalf of undocumented workers to protect the wages and working conditions of domestic workers:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. . . . As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) application of the

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[15] Legalization provisions were also part of the proposed immigration reform laws taken up by prior Congresses. *See, e.g.*, S. Rep. No. 97-485, at 18 (1982); S. Rep. No. 98-62, at 19 (1983). The provisions were introduced in part to protect domestic workers. *See* S. Rep. No. 97-485, at 19; S. Rep. No. 98-62, at 20.

[16] On the House side, the Judiciary Committee report concluded that legalization "would help to prevent the exploitation of this vulnerable population in the workplace." H.R. Rep. No. 99-682, pt. 1, at 49. Congressman Mazzoli, moreover, in his remarks on the House floor, commented that undocumented immigrants "live in a subrosa, twilight society. They are vulnerable to exploitation because of their illegal status. Unscrupulous employers prey on their fear of discovery and use threats of deportation to quell complaints about treatment, working conditions, and pay." 132 Cong. Rec. at H9712-9713.

> NLRA "helps to assure that wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.

H.R. Rep. No. 99-682, pt.1, at 58.

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In sum, awarding backpay to undocumented workers furthers two of IRCA's statutory purposes—the curtailment of illegal immigration and the protection of domestic workers. Such awards are thus entirely consistent with IRCA, and denying the Board's authority to order a limited backpay award as in this case would be violative of Congress's nuanced approach to immigration and labor policy as codified in IRCA.

II. FOR MORE THAN A CENTURY CONGRESS HAS PASSED IMMIGRATION LEGISLATION DESIGNED TO PROTECT THE WAGES AND WORKING CONDITIONS OF DOMESTIC WORKERS.

Although IRCA may be the most comprehensive congressional attempt to negotiate the relationship between labor markets and immigration, Congress has always legislated in the immigration area with an eye to American labor markets, often in order to protect the wages and working conditions of domestic workers. Without regard to whether Congress's view of immigrant workers' effects on the domestic labor market is empirically sound, the history of immigration legislation is entirely consistent with the assumptions underlying IRCA. Indeed, as much as IRCA represents a departure from more traditional approaches to immigration enforcement, it is also part of a long history of immigration legislation designed to protect domestic labor. Therefore, the Board's order in this case is consistent not only with IRCA but with the long history of Congressional efforts to protect domestic workers from the perceived adverse effects of immigration.

For more than a century, Congress has been acutely aware of the complicated connections between immigration law and domestic labor markets. Indeed, "[a]n element that runs through congressional debate and action on immigration is that of labor market considerations. It would in fact be difficult to determine where immigration policy ends and labor policy begins, the two are so closely interrelated." E.P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, at 492 (1981); *see also id.* at 502 ("Congress in designing immigration legislation has been responsive to considerations of the labor supply and the labor market."). At times, Congress has responded to the labor needs of certain sectors of the domestic economy by adopting immigration measures designed to facilitate the entry of immigrants with certain needed skills.[17] At other times, and more importantly for present purposes, Congress has acted to protect the domestic labor force from what it perceived as undue immigrant competition. *See Sure-Tan*, 467 U.S. at 893 ("A primary purpose in restricting immigration is to preserve jobs for American workers . . . .").

Through time, Congress has repeatedly legislated on the assumption that immigrant labor, and particularly unauthorized immigrant labor, puts downward pressure on the wages and working conditions of domestic workers. This conception dates at least to 1882, when Congress enacted the Chi-

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[17] During the 1940s and 1950s, for example, Congress perceived a shortage of domestic agricultural workers and acted to redress this shortage by authorizing, through a series of international agreements and legislative enactments popularly referred to as the "Bracero" program, the entry of thousands of immigrant laborers. *See, e.g.*, S. Rep. No. 88-391, at 2-4 (1963); *see also* Act of July 12, 1951, 65 Stat. 117. Since 1924, Congress has accorded preferences within the immigration quota system to immigrants seeking entry into the United States who can demonstrate job-related skills in certain targeted sectors of the economy. *See* Act of May 26, 1924, § 4d, 43 Stat. 153, 155; *see also* 8 U.S.C. § 1153(b) (establishing current scheme of employment-based immigration preferences); *see generally* Hutchinson, *supra*, at 494-99 (discussing history of occupational preference classes in immigration law).

nese Exclusion Act (Act of May 6, 1882, 22 Stat. 58) in part to protect domestic workers from having to compete with Chinese labor. *See* House Comm. on the Judiciary, 100th Cong., *Grounds for Exclusion of Aliens under the Immigration and Nationality Act: Historical Background and Analysis* 8 (Comm. Print 1988) ("*Grounds for Exclusion*") ("The Chinese Exclusion Act . . . was enacted out of a concern for protecting domestic labor from foreign competition, combined with racial prejudice.").[18] The consequences of such competition, Congress had found, were the depression of wages to "ruinously low rates" incapable of "furnish[ing] the barest necessities of life to an American," and the occupation of so many jobs by immigrant laborers that there was "a lack of employment" for domestic workers. S. Rep. No. 44-689, at IV-V (1877). The Chinese Exclusion Act and its successor statutes[19] addressed that concern by generally forbidding Chinese workers from entering the country.

The contract labor laws, the first of which passed in 1885 (Act of Feb. 26, 1885, 23 Stat. 332), pursued similar objectives:

> The first of the alien contract labor laws was enacted . . . against a background of depression, strikes, and intense lobbying by the Knights of Labor. The Act prohibited the importation of contract foreign labor [with certain exceptions for skilled labor]. Its purpose was to protect domestic labor, primarily by curtailing the practice of employers importing large numbers of foreign workers in order

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18 To be sure, this early concern with labor competition also found expression in overtly racist provisions. *See, e.g.*, H.R. Rep. No. 46-572, at 11 (1880); H.R. Rep. No. 45-240, at 2-3 (1878). Nonetheless, it is evident that the Chinese Exclusion Act was motivated in part by distinct labor-protecting aims.

19 *See* Act of July 5, 1884, 23 Stat. 115; Act of Sept. 13, 1888, 25 Stat. 476; Act of Oct. 1, 1888, 25 Stat. 504; Act of May 5, 1892, 27 Stat. 25; Act of Apr. 29, 1902, 32 Stat. 176; Act of Apr. 27, 1904, 33 Stat. 428.

> to force domestic workers to work at reduced wages.

Grounds for Exclusion at 8;[20] *see also* Act of Feb. 23, 1887, 24 Stat. 414; Act of Oct. 19, 1888, 25 Stat. 565; Act of Mar. 3, 1891, 26 Stat. 1084; Act of Apr. 30, 1900, 31 Stat. 141; Act of Mar. 3, 1903, 32 Stat. 1213; Act of Feb. 20, 1907, 34 Stat. 898; Act of Feb. 5, 1917, 39 Stat. 874.[21]

Congress was similarly motivated in 1907 when it granted the President greater discretionary authority to limit

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20 *See also* S. Rep. No. 81-1515, at 50 (1950) (noting that the contract labor laws sought to end "the practice of certain employers importing cheap labor from abroad . . . . [in order] to oversupply the demand for labor so that the domestic laborers would be forced to work at reduced wages.").

21 At the same time as it was passing immigration legislation designed to protect domestic labor, Congress recognized the need to respond directly to the exploitation of some immigrant workers in this country by targeting the employers guilty of such exploitation. As early as 1874, for example, Congress in the Padrone Act responded to the phenomenon of young boys being taken from their families in Italy and brought to this country to work by making it a criminal offense to "willfully bring into the United States . . . any person inveigled or forcibly kidnapped in any other country, with intent to hold such person . . . in confinement or to any involuntary service," or to sell or hold any such person to such involuntary service. Act of June 23, 1874, 18 Stat. 251; *see United States v. Kozminski*, 487 U.S. 931, 947 (1988) ("Congress enacted the Padrone statute in 1874 'to prevent [this] practice of enslaving, buying, selling, or using Italian children.'") (alteration in original) (quoting 2 Cong. Rec. 4443 (1874) (Rep. Cessna)).

Congress demonstrated some direct concern for immigrants' working conditions in the Bracero program as well. Congress concluded that the program would reduce the exploitability of immigrant farmworkers by legalizing their status and by regulating the conditions of their employment. *See* H.R. Rep. No. 83-1199, at 4 (1954) (noting that workers would be paid the prevailing wage under the program); H.R. Conf. Rep. No. 82-668 (1951), *available at* 65 Stat. 1569, 1580 (stating that the program would reduce exploitability); Act of July 12, 1951, 65 Stat. 117 (requiring the federal government to guarantee employers' compliance with individual work contracts relating to the payment of wages and the furnishing of transportation).

immigration that he determined was harmful to domestic labor. Specifically, a 1907 statute authorized the President to deny admission to persons whose entrance he deemed to be "to the detriment of labor conditions therein." Act of Feb. 20, 1907, 34 Stat. 898, proviso to § 1; *see also* Act of Feb. 5, 1917, 39 Stat. 874, proviso to § 3. A Senate Report later explained that this authorization "was a result of the growing alarm, particularly on the Pacific coast and in States adjacent to Canada and Mexico, that labor conditions would be seriously affected by continuation of the then existing rate of increase in admission of Japanese laborers." S. Rep. No. 81-1515, at 57 (1950); *accord* H.R. Rep. No. 82-1365, at 19 (1952).

A central immigration restriction in place throughout much of the last century—the admittedly racist nationality-based quota system—was similarly enacted in part as an attempt to protect domestic workers. When Congress passed the Immigration and Nationality Act of 1921 (Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5) establishing quotas on the basis of nationality, it stated explicitly that one of its purposes was to protect the domestic labor market. H.R. Rep. No. 65-1015, at 8 (1919) (stating that, in the wake of World War One, it would be a "tragedy if we allow thousands of aliens to come to our shores to work for low wages and thereby secure the jobs that ought to go to the returning American soldiers and the war workers"). Put slightly differently, the "large unemployment in the United States [made] it impracticable for the United States to accept a heavy immigration." H.R. Rep. No. 67-4, at 3 (1921).

By the early 1950s, Congress had focused its concern about the adverse competitive effects of immigrant labor, concentrating on the special problems posed by unauthorized immigration:

> The illegal immigrant is always subject to deportation, and under such circumstances, the wetback will work for wages far below a level which will enable him to maintain a proper standard of living for himself or his family. At the same time, their employment under cuts the going wage of domestic farm later and thus forces the latter to accept substandard wages also, or move on to other work.

S. Rep. No. 82-214 (1951), *available at* 65 Stat. 1569, 1570-71.[22] That is, Congress concluded that because unauthorized immigrant workers are especially likely to work for substandard wages, they exert exceptionally strong downward pressure on prevailing wages and workplace standards throughout the labor pool.

While comprehensive legislation targeted specifically at alleviating the impact of *undocumented* immigration on the domestic workforce generally did not appear until IRCA itself,[23] Congress continued through the twentieth century to tailor the laws governing legal immigration to the needs and interests of domestic labor markets. The certification system is a prime example of that tailoring. In § 212(a)(14) of the

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[22] Again, that Congress expressed itself in a decidedly racist manner does not negate its focus on domestic labor.

[23] There were some precursors, however. The 1974 amendments to the Farm Labor Contractor Act of 1963 (Pub. L. No. 93-518, 88 Stat. 1652), for example, established criminal penalties for certain contactors who knowingly engaged the services of illegal aliens. The goal of the amendments was to mitigate the adverse impact of illegal immigrant labor, as the Senate Report accompanying the amendments made clear:

> The Committee is aware that illegal aliens have become an increasingly large source of farm labor in this country, and that the services of a contractor are often utilized to procure this clandestine work force. . . . [I]f this tide of illegal immigration is to be stemmed, stricter enforcement and stronger penalties must be applied against those who violate the [Farm Labor Contractor] Act. These additional steps are necessary in light of the adverse effect such importation of illegal aliens has had on the wages and job security of native Americans and lawfully admitted aliens, especially in times of high unemployment.

S. Rep. No. 93-1295, at 4 (1974); *accord* S. Rep. No. 93-1206, at 4 (1974).

Immigration and Nationality Act of 1952, Congress enacted a provision (now codified at 8 U.S.C. § 1182(a)(5)) aimed at providing strong "safeguards for American labor" by:

> provi[ding] for the exclusion of aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor if the Secretary of Labor has determined that there are sufficient available workers in the locality of aliens' destination who are able, willing, and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed.

H.R. Rep. No. 82-1365, at 50-51 (1952); *see also* H.R. Rep. No. 93-461, at 13 (1973); H.R. Rep. No. 94-1553, at 10 (1976).[24] This certification requirement was designed specifically to "protect the domestic labor force." *Patel v. INS*, 811 F.2d 377, 383 (7th Cir. 1987); *see Londono v. INS*, 433 F.2d 635, 636 (2d Cir. 1970) (describing the certification procedures as a "safeguards carefully erected to protect the domestic labor market.").

In short, for over a century Congress has focused on protecting domestic workers from what it perceived to be the adverse effects of immigration by regulating the entrance of aliens into the country. Read against this history, IRCA's choice of mechanisms to address unauthorized immigration

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[24] Similar certification requirements were enacted for particular categories of immigrants, such as contract workers, earlier in the twentieth century. *See* Act of July 12, 1951, 65 Stat. 117, 118 ("No workers [shall be admitted] unless the Secretary of Labor has determined and certified that (1) sufficient domestic workers [are not available], (2) the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed . . . ."); Act of Feb. 5, 1917, 39 Stat. 874, proviso to § 3 ("[S]killed labor, if otherwise admissible, may be imported if labor of like kind unemployed can not be found in this country."); Act of Feb. 20, 1907, 34 Stat. 898, proviso to § 2; Act of Mar. 3, 1903, 32 Stat. 1213, proviso to § 2.

and protect domestic workers is best understood as reflecting longstanding congressional conclusions about the complex relationship between immigration—especially unauthorized immigration—and domestic labor. Accordingly, the Board's award of backpay in this case is entirely consistent not only with IRCA itself, but also with over a century of congressional action aimed at protecting domestic labor.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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December 2001

No. 00-1595

DEC 10 2001

IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ARIZONA, CALIFORNIA, HAWAII, MASSACHUSETTS AND WEST VIRGINIA AND COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The States of New York, Arizona, California, Hawaii, Massachusetts and West Virginia and the Commonwealth of Puerto Rico, through their attorneys general, respectfully submit this amicus curiae brief. Amici include high-immigration states that are believed to have most of the United States' undocumented population.[1] These states have a strong interest in the vigorous enforcement of federal labor law, as applied to both lawful and undocumented workers.

Federal labor law, as well as other federal statutes regulating workplace conditions, operates alongside state laws to ensure adequate protection of employees in the workplace. If the federal government is prohibited from awarding back pay remedies to undocumented workers, employers who hire such workers will be able to violate the National Labor Relations Act with impunity — a result that will have particularly unfortunate consequences in industries with a significant proportion of undocumented employees.

The amici states also have a vital interest in enforcing their own employment and other laws, which have always been recognized as within the states' police powers. Remedies available under such state laws typically include back pay for employees who have been fired illegally. Especially since this Court decided *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA"), courts have weighed both immigration law

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1. The Immigration and Naturalization Service ("INS") estimates that as of October 1996, there were five million illegal residents in the United States. The eight states that the INS believes had the largest undocumented populations were California (2 million), Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), Arizona (115,000) and Massachusetts (85,000). "INS Releases Updated Estimates of U.S. Illegal Population," http://www.ins.gov/graphics/publicaffairs/newsrels/illegal.htm.

and state statutes and often concluded that state law requires the availability of back pay or other damages — even for periods when an alien was not legally authorized to work.

Although the sole question in this case involves the discretion of the federal National Labor Relations Board ("NLRB" or "Board") to provide back pay under federal law, petitioner wrongly implies that *Sure-Tan* or IRCA bars *all* back pay awards to undocumented aliens.[2] Should petitioner prevail on the central issue in this case, harmful consequences for state law enforcement could result. Courts could conclude that a ruling by this Court foreclosing NLRB awards to undocumented workers based on the balance of public policies under federal law extends to the states as well. Such an outcome would severely jeopardize the ability of states to enforce minimum wage, safety, equal employment and other state laws against the many employers whose workers are undocumented. It would give such firms a competitive edge against employers that are more scrupulous, and would infringe state sovereignty.

Regardless of the outcome of this case, courts applying state statutes that differ from the NLRA should remain free to balance the equities in different ways, as they have in the past. As long as federal immigration law does not prohibit awards of back pay to undocumented workers who are unlawfully discharged — which, as demonstrated by the United States and various amici, it does not — the states, in the exercise of their police and sovereign powers, must remain free to strike their own policy balance.

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2. *See, e.g.*, Petitioner's Brief at 7 (*Sure-Tan* held undocumented workers may not "recover backpay as compensation for an unlawful discharge"), 8 (*Sure-Tan* "recognized that the discharged employees would very likely be left without any remedy whatsoever"), 10 (undocumented aliens are "not entitled to backpay"), 20 ("Immigration Laws Prohibit an Award of Backpay"), and 28 (undocumented workers are "not eligible for an award of backpay").

SUMMARY OF ARGUMENT

If federal and state laws protecting labor standards and prohibiting employment discrimination are to be effective, the tribunals that enforce them must have the power to consider back pay awards to undocumented workers. Despite IRCA, numerous undocumented employees work in the amici states. Their presence is especially significant in particular areas and occupations. In many industries, state employment statutes would be rendered meaningless if no back pay remedy for violations were available to undocumented workers. Enforcement of these laws depends on cooperation from employees, which is difficult enough to obtain from workers subject to deportation. If undocumented workers were foreclosed from monetary remedies it would be impossible to obtain their assistance in law enforcement investigations, and state laws that protect both documented and undocumented employees could not be enforced.

State law routinely grants undocumented workers a back pay remedy in a variety of contexts. In many state tort and contract cases, for example, undocumented aliens have been permitted to sue their employers and their lost wages have been treated as damages, even though the aliens could not lawfully have earned the same money as wages. Similarly, most state workers' compensation cases have found that undocumented employees are entitled to workers' compensation benefits, even though not lawfully employed. Cases applying state and federal labor standards and equal employment law have likewise awarded back pay to undocumented aliens who have suffered harm under the applicable statutes. And states with labor laws that protect workers not covered by the NLRA apply those laws to award back pay to undocumented workers who have been fired illegally.

The rationale for awarding back pay to undocumented workers set forth in these state law cases applies equally to the

present case. Like state statutes supporting back pay awards, the NLRA does not distinguish documented from undocumented employees. State courts have likewise recognized that providing undocumented workers a back pay award gives wronged individuals the only possible remedy, while also protecting law-abiding employers from unfair competition. Moreover, as decisions applying state laws recognize, prohibiting back pay remedies for undocumented workers would undermine immigration policy by encouraging employers to hire undocumented aliens, and would also undermine labor policy by leaving employers' legal violations unpunished.

Regardless of the outcome of this case, this Court should clarify that federal law does not preempt state law awarding back pay to undocumented workers. States are free to regulate these employees unless such regulation clearly conflicts with federal law. Neither immigration law nor any other federal law creates such a conflict.

ARGUMENT

I. The availability of back pay for undocumented employees is crucial to the effectiveness of state law.

As their States' chief law enforcement officers, amici support the availability of back pay for undocumented employees. Approximately five million undocumented aliens reside in the United States.[3] Amici do not condone the presentation of false documents or other violations of immigration law. Such misconduct certainly subjects those aliens to deportation and criminal prosecution, but it should not result in denial of redress for acts whose wrongfulness was unrelated to an employee's status. Nor should it give employers a free pass for unrelated wrongdoing. To do so is unfair not only to

3. *See supra* at n.1.

the aliens, but also to other employees, whose collective legal protection is undercut, and to employers that obey the law.[4]

Furthermore, enforcement of employment law, including minimum wage, occupational safety and many other laws, depends on cooperation from employees. Such cooperation is difficult enough to obtain from workers who fear deportation that will proceed, if warranted by immigration law, regardless of an employer's misconduct. Breach of laws that protect undocumented employees would never be reported if these workers were also foreclosed from statutory remedies. In many industries the effect would be the curtailment or effective elimination of minimum wage, safety and other important laws. The states' ability to enforce their employment laws — which necessitates the availability of a back pay remedy — should not be thwarted simply because of an employee's undocumented status. *Cf. Montero v. INS*, 124 F.3d 381, 384-85 (2d Cir. 1997) (enforcement of immigration law should not be impeded by labor law violation of an employer that illegally called in the INS).

Initiatives to enforce employment laws undertaken by various amici states demonstrate the critical importance of back pay remedies. For example, a recent investigation of New York City's greengroceries revealed that workers, mostly immigrants from Mexico, were paid as little as $2.61 an hour for work weeks as long as 84 hours, when federal and state minimum wage laws require $5.15 per hour and time-and-a-half for work over 40 hours. Many workers are believed to be undocumented, and securing their cooperation during the investigation would have been impossible if they were ineligible for monetary remedies. State-court lawsuits filed by the New York Attorney General to

4. That hiring undocumented workers in order to pay less than the prevailing wage can directly harm competing employers was ently recognized in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, __ F.3d __, 2001 U.S. App. LEXIS 25170 at *17-*19 (2d Cir., Nov. 15, 2001).

enforce minimum wage laws resulted in the recovery of over $600,000 for underpaid workers. Without a back pay remedy, New York's greengroceries would effectively be placed outside the reach of the minimum wage laws.

California, which has the largest number of undocumented residents among the fifty states, has similarly found the availability of back pay remedies essential to effective enforcement of state labor laws. The California Agricultural Labor Relations Board (ALRB) enforces the Agricultural Labor Relations Act (ALRA), which affords farm workers rights analogous to those provided to other workers by the NLRA. Cal. Lab. Code §§ 1140-1166 (Deering 2001); *see also Fresh International Corp. v. ALRB*, 805 F.2d 1353, 1358-60 (9th Cir. 1986) (describing enforcement of ALRA as important state interest). California has the largest agricultural workforce in the United States, including an estimated 900,000 individuals each year. *See* Philip L. Martin, *Promises to Keep: Collective Bargaining in California Agriculture* (1996) at 20, 40. According to the United States Department of Labor, approximately 52 percent of farm workers in the United States in 1997-1998 were undocumented,[5] and the ALRB believes that the proportion of undocumented farm workers in California likely exceeds this level. Remedies available under the ALRA for unfair labor practices are generally restricted to cease-and-desist orders, back pay, and reinstatement. In light of the substantial proportion of undocumented workers in California's agricultural sector, the inability to award back pay would deprive the ALRB of any meaningful remedies with which to enforce the law, and render the ALRA a virtual nullity.

In Massachusetts, the Attorney General's Office has investigated a significant number of wage violations involving

5. U.S. Dep't of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers* (March 2000), http://www.dol.gov/asp/programs/agworker/report_8.pdf, at 22.

immigrants in the asbestos remediation industry, illustrating the importance of employee cooperation and a back pay remedy to enforcement of safety and environmental laws. Advanced Building Systems, Inc., an asbestos removal firm, was charged with failure to pay overtime to 97 immigrant employees, many of whom were most likely undocumented. The company had failed to list the immigrant workers on its payroll records. Because of the missing or false information about the identities of many immigrant employees, it appears that many had never been legally licensed to handle asbestos. The Massachusetts Attorney General is currently involved in numerous cases against other asbestos removal contractors that failed to pay immigrant employees properly.

II. State law grants undocumented workers a back pay remedy in a variety of contexts, for reasons that support an affirmance of the decision below.

In dealing with the back pay claims of undocumented workers, the states have usually followed an approach similar to that applied under the NLRA in *Sure-Tan*, which held that "[c]ounterintuitive though it may be," there was no conflict between the mandate of immigration law and legal protection for such workers under the NLRA. 467 U.S. at 891. These cases arise in a variety of contexts, and reflect considerations that should likewise lead this court to affirm the decision below.

A. Courts applying state law in a variety of contexts have permitted back pay awards to undocumented workers.

Decisions in several different areas of state law support the availability of back pay awards to undocumented employees.

State tort and contract cases. In many state tort and contract cases brought by undocumented aliens, lost wages have been treated as damages. While some, but not all, of these cases

antedate *Sure-Tan*, their reasoning remains relevant to the question before the Court. State courts have rejected claims that general language governing lawsuits excludes undocumented workers for much the same reasons *Sure-Tan* refused to exclude them from the term "employee."[6] These state decisions include, for example, a decision by the Alaska Supreme Court allowing an undocumented worker's contract suit for unpaid wages, *see Gates v. Rivers Constr. Co.*, 515 P.2d 1020 (Alaska 1973), and decisions from New Jersey, New York, and Virginia courts holding that undocumented workers or their heirs could be awarded wages lost because of accidents or injuries. *See Montoya*, 401 A.2d at 1104-06; *Public Administrator of Bronx County v. Equitable Life Assurance Society*, 595 N.Y.S.2d 478 (N.Y. App. Div. 1993); *Peterson v. Neme*, 281 S.E.2d 869, 872 (Va. 1981). State courts have thus allowed undocumented aliens to receive as damages money they could not lawfully have earned as wages.

The reasons given by state courts in support of these determinations to award damages for lost wages fall into three categories: statutory language, fairness, and the goals of immigration policy. For example, in permitting an undocumented worker to sue for promised wages even though most illegal contracts are unenforceable, the Alaska Supreme Court pointed to each of these rationales:

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6. *E.g.*, *Montoya v. Gateway Insurance Co.*, 401 A.2d 1102, 1105-06 (N.J. Super. Ct. 1979) (illegal employee an "income producer" and "in an occupational status" within the meaning of insurance policy); *Maldonado v. Allstate Insurance Co.*, 789 So. 2d 464, 468-70 (Fla. Dist. Ct. App. 2001) (illegal alien a "resident" within the meaning of no-fault insurance statute); *Torres v. Sierra*, 553 P.2d 721, 724 (N.M. Ct. App. 1976) (illegal alien a "person" within the meaning of Wrongful Death Act); *Catalanotto v. Palazzolo*, 259 N.Y.S.2d 473, 475-77 (N.Y. Sup. Ct. 1965) (illegal alien a "qualified person" within the meaning of uninsured motorist statute).

> First, . . . the statute itself does not specifically declare the labor or service contracts of aliens . . . to be void. . . . Second, . . . a harsh and undesirable consequence . . . should be countenanced only when clearly demonstrated to have been intended by the legislature. Third, . . . the safeguarding of American labor . . . would not be furthered by permitting employers . . . to refuse to pay [undocumented workers]. . . . [T]o so hold could well have the opposite effect. . . .

Gates, 515 P.2d at 1021-02. Other courts have focused specifically on the fact that the availability of back pay damages does not impede immigration policy. The Virginia Supreme Court explained that "a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses." *Peterson*, 281 S.E.2d at 872. A New Jersey court stressed the same point: While no one "illegally enters this country for the purpose of initiating litigation," denying remedies could increase illegal entries as employers exploit "the alien's inability to lodge claims against them for wages or on account of injuries sustained." *Montoya*, 401 A.2d at 1104; *see also Arteaga v. Literski*, 265 N.W.2d 148, 150 (Wis. 1978) ("It cannot be seriously argued that people enter this country illegally so they can recover for an injury").

State workers' compensation cases. As with state tort and contract suits, most state workers' compensation cases have held that undocumented employees can receive monetary relief. This is so even though entitlement to lost wages in workers' compensation claims arises from a state statute specifically governing "workers" or "employees," a category into which undocumented employees would not have fallen if they had obeyed the law.

The prevailing rule in state courts is that "the distinction between alien and citizen is of no relevance to compensation

law." 5-97 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 97.07 (2001). Moreover, courts expressly considering the question have concluded that IRCA does not preempt the application of state workers' compensation law to undocumented workers.[7] Accordingly, workers' compensation benefits are available to illegal employees in most states.[8] Indeed, when Virginia's Supreme Court found undocumented employees excluded from workers' compensation, the legislature amended the law to cover "aliens and minors, . . . whether lawfully or unlawfully employed." *See Rios v. Ryan, Inc.*, 542 S.E.2d 790, 792 n.2 and 794 (Annunziata, J., concurring) (Va. Ct. App. 2001) (finding amendment not retroactive).

As with cases providing for the award of lost wages in tort and contract claims, state courts refer to statutory language, fairness, and immigration policy in explaining why lost wages

7. *See Dowling v. Slotnik*, 712 A.2d 396, 402-05 (Conn. 1998); *Reinforced Earth Co. v. Workers' Compensation Appeal Board*, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000). *Cf. Iowa Erosion Control, Inc. v. Sanchez*, 599 N.W.2d 711, 715 (Iowa 1999) (IRCA's purpose "was not to preempt state laws benefitting undocumented aliens"). Colorado and Nevada courts likewise concluded that IRCA does not bar payment of benefits to undocumented employees. *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Tarango v. State Indus. Ins. System*, 25 P.3d 175, 178-79 (Nev. 2001).

8. *See, e.g., Del Taco v. Workers' Compensation Appeal Board*, 94 Cal. Rptr. 2d 825, 828 (Cal. Ct. App. 2000); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138, 1139 (La. Ct. App. 1996); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 224 (N.J. Super. Ct. App. Div. 1996); *Testa v. Sorrento Restaurant, Inc.*, 197 N.Y.S.2d 560, 562 (N.Y. App. Div. 1960); *Lang v. Landeros*, 918 P.2d 404, 406 (Okla. Ct. App. 1996); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 636-37 (Tex. Civ. App. 1972). *But see Felix v. State ex rel. Safety & Compensation Division*, 986 P.2d 161, 163-64 (Wyo. 1999) (Wyoming workers' compensation statute excludes undocumented employees); *Cenvill Development Corp. v. Candelo*, 478 So. 2d 1168, 1170 (Fla. Ct. App. 1985) (employer estopped from denying coverage "only where he knew or should have known of the true status of the employee").

are likewise available in workers' compensation actions. The text of state laws supports such an award because among states whose courts have considered the issue, only in Wyoming does statutory language differentiate undocumented from other employees. *See Rios*, 542 S.E.2d at 794 n.3 (Annunziata, J., concurring) ("All but one of the several jurisdictions . . . that have considered the question have held that a claimant's illegal alien status does not affect or preclude workers' compensation benefit awards.") As for fairness considerations, workers' compensation replaces tort claims, whose viability, as discussed above, would not be affected by a victim's illegal status. *See Mendoza*, 672 A.2d at 225 (no basis to deny "the substitutionary remedy").[9] Finally, courts have generally agreed that excluding the undocumented from statutory remedies is more likely to increase than to discourage illegal immigration, while also creating other undesirable incentives. While benefits in case of injury "realistically cannot be described as an incentive for undocumented aliens to enter this country illegally," denying coverage would create "a financial incentive for unscrupulous employers" to recruit them. *Dowling*, 712 A.2d at 404. *See also Mendoza*, 672 A.2d at 225 (denying coverage would "provide a disincentive to assuring workplace safety" and "have the further undesirable effect of encouraging employers to hire illegal aliens"); *Reinforced Earth*, 749 A.2d at 1039-40 (employers might "seek out illegal aliens . . . because they will not be forced to insure against or absorb the costs of work-related injuries").

Labor standards and equal employment law. A back pay remedy is also available under many state labor standards and equal employment laws. In part because most state labor standards investigations are settled at the administrative level based on the availability of remedies that include back pay,

9. States have similarly recognized that undocumented and underage employees resemble each other in being legally barred from work yet vulnerable, if they work anyway, to unrelated injuries for which a remedy should be awarded. *See, e.g., Testa*, 197 N.Y.S.2d at 562; *Rios*, 542 S.E.2d at 792 n.2.

there are few reported decisions applying state labor standards and equal opportunity statutes, but most states have laws in these areas that are similar to their federal counterparts. Undocumented aliens have been awarded back pay under the federal Fair Labor Standards Act, after as well as before *Sure-Tan* and IRCA.[10] The same is true under state minimum wage laws. *See, e.g., Nizamuddowlah v. Bengal Cabaret, Inc.*, 415 N.Y.S.2d 685 (N.Y. App. Div. 1979). Equal opportunity law has also been invoked by undocumented employees,[11] who are especially vulnerable to sexual harassment. Back pay is a significant potential remedy, because harassment often ends in the victim's direct or constructive discharge.[12]

States with labor laws that protect workers not covered by the NLRA likewise extend those laws to undocumented workers. Although the NLRA preempts state labor law, a number of states have labor statutes similar to the NLRA that protect workers not within the NLRA's scope, most notably agricultural workers. State tribunals have found illegally fired undocumented workers entitled to back pay under these statutes. *See Arizona*

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10. *See, e.g., Patel v. Quality Inn South*, 846 F.2d 700, 704-06 (11th Cir. 1988); *Contreras v. Corinthian Vigor Ins. Brokerage*, 25 F. Supp. 2d 1053, 1056-58 (N.D. Cal. 1998); *Alvarez v. Sanchez*, 482 N.Y.S.2d 184 (N.Y. App. Div. 1984).

11. *See, e.g., Rios v. Steamfitters Local 638*, 860 F.2d 1168, 1171-73 (2d Cir. 1988); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 587-94 (E.D. Cal. 1991). The EEOC's "Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," N-915.040 (Oct. 26, 1999), at nn.32-35 and accompanying text, takes an approach like the NLRB's, barring a reinstatement order for a discriminatee known to be forbidden to work, but not back pay.

12. *See, e.g., EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1507-09 (9th Cir. 1989); *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12, 15 (Cal. Ct. App. 1998); *Urrea v. New England Tea & Coffee Co.*, 2000 Mass. Super. Ct. LEXIS 690 (Mass. Super., Sept. 1, 2000) at *2.

Farmworkers Union v. Phoenix Vegetable Distributors, 747 P.2d 574, 578 (Ariz. Ct. App. 1986) (enforcing Arizona Agricultural Employment Relations Board determination); *Phillip D. Bertelsen, Inc. v. ALRB*, 29 Cal. Rptr. 2d 204, 209 (Cal. Ct. App. 1994) (enforcing ALRB determination); *Rigi Agricultural Services, Inc.*, 11 ALRB No. 27 (1985); *La Crepe-Number 3 Ltd.*, 36 SLRB 52, 53 (1973) (New York State Labor Relations Board decision). While these cases involved pre-IRCA conduct, IRCA, as discussed in Point III, does not supersede the holdings. It forbids hiring workers the employer knows to be undocumented, not paying wages or back pay for a period when the employer did not know the worker's immigration status.

B. The decision below should be upheld for reasons reflected in the state-law decisions.

Amici states adopt the arguments of the United States Solicitor General that the decision below should be affirmed. Moreover, respondent's argument that the NLRA permits undocumented employees to receive back pay but not reinstatement to work from which they are foreclosed by federal law is well within the mainstream of interpretation of other employment statutes and state common law.

The reasoning relied on by state courts to uphold back pay remedies for undocumented workers — regarding statutory language, fairness, and immigration policy — is relevant to the construction of the NLRA. First, the text of the NLRA and relevant immigration statutes does not foreclose the award of back pay. Like state statutes such as the agricultural labor law applied in *Bertelsen*, 29 Cal. Rptr. 2d at 204, the NLRA does not distinguish documented from undocumented employees. Congress, though well aware that there are many undocumented workers, has never changed that. As the D.C. Circuit held in the present case, "IRCA neither amends nor repeals the NLRA or any other labor law," 237 F.3d at 646, and the same is true of later amendments to immigration law discussed in Point III below.

Second, state courts recognize that fairness weighs strongly in favor of authorizing back pay remedies for workers if they are wronged, regardless of their immigration status, *see, e.g.*, *Gates*, 515 P.2d at 1021-22, just as in other contexts undocumented aliens are not wholly "beyond the protection of the law." *Janusis v. Long*, 188 N.E. 228, 230-32 (Mass. 1933) (alien's illegal presence no defense to tort suit). *Cf.* Petitioner's Br. at 8 (undocumented workers should "be left without any remedy whatsoever"). Eliminating an otherwise-available reinstatement remedy for a worker who has presented fraudulent documents to obtain employment — to say nothing of the prospect of deportation and criminal prosecution — sufficiently penalizes such misconduct. Elimination of back pay would serve only to undermine a statute that protects all employees, documented and undocumented, as well as protecting law-abiding employers from unfair competition.

Third, this Court's reconciliation of the NLRA and IRCA should be informed by the state courts' insight that back pay "realistically cannot be described as an incentive for undocumented aliens to enter this country illegally." *Dowling*, 212 A.2d at 404. "[A] person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses." *Peterson*, 281 S.E.2d at 872. Nor can it "be seriously argued that people enter this country illegally so they can recover for an injury that will be inflicted upon them later." *Arteaga*, 265 N.W.2d at 150; *see also Montoya*, 401 A.2d at 1104 (no one "illegally enters this country for the purpose of initiating litigation").

The remedy upheld by the D.C. Circuit will not undermine immigration policy by increasing the employment of undocumented workers. Striking it down, however, will encourage employers to hire undocumented aliens who cannot "lodge claims against them for wages or on account of injuries sustained," *Montoya*, 401 A.2d at 1104, and "to enter into the very type of contracts sought to be prevented," *Gates*, 515 P.2d

at 1022. That labor policy would also be undermined by such a ruling is self-evident. Even with respect to employers not seeking to punish pro-union workers, a rule barring back pay would, as this Court explained in reference to the Age Discrimination in Employment Act, undermine the "objective of forcing employers to consider and examine their motivations" before acting. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995).

Reversal of the D.C. Circuit would thus undermine two important policies, reflected in both labor law and immigration law, just as making the undocumented ineligible for workers' compensation would "provide a disincentive to assuring workplace safety" and "have the further undesirable effect of encouraging employers to hire illegal aliens." *Mendoza*, 672 A.2d at 225. For these reasons, as well as those set forth by the United States Solicitor General, the D.C. Circuit should be affirmed.

III. Federal law does not preempt state law awarding back pay to undocumented workers.

To preserve the wide array of state workplace enforcement mechanisms that rely on back pay awards, this Court should clarify that federal law does not preempt state statutes permitting undocumented workers to recover back pay. As recognized in *De Canas v. Bica*, 424 U.S. 351 (1976), states are free to regulate even undocumented employees unless there is a clear conflict with federal law. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* at 355. Rather, state power to regulate employment extends to undocumented workers unless there is a "specific indication . . . that Congress intended" otherwise. *Id.* at 358. Federal immigration law provides no such indication.

In the absence of a Congressional mandate barring a particular remedy for undocumented workers, states are free to

extend them the same remedies available to other employees when the states deem it rational to do so. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States"). Most states deem undocumented workers to be "the same" as other employees in various legal contexts. A state can limit the remedies of undocumented workers; a few states have, as discussed above. But federal immigration law does not mandate such limitations, and this Court should not thwart the intention of the states that permit back pay awards by imposing a broad rule that would, as Justice Kennedy once put it, "leave helpless the very persons who most need protection from exploitative employer practices." *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring). Their exclusion from back pay remedies, if it is to happen, must be enacted by Congress or effected by individual states.

Petitioner's brief wrongly implies that *Sure-Tan* or IRCA bars all back pay awards to undocumented aliens, *see supra* at n.2, but immigration law plainly does not do so. IRCA forbids an employer to hire someone it knows to be undocumented, but nowhere does it prohibit the payment of back wages for a period when the employer did not know the worker's immigration status. As the court below noted, "nothing in IRCA directly bars such an award . . . . IRCA neither amends nor repeals the NLRA or any other labor law." 237 F.3d at 646 (relying upon legislative history indicating that IRCA does not limit the discretion of federal or state agencies). By contrast, IRCA provisions that govern employer petitions to admit workers to the United States and sanctions on those that hire undocumented workers do expressly preempt state regulation. *See* 8 U.S.C. §§ 1188(h)(2) and 1324a(h)(2). IRCA should not be read "as preempting anything but the laws specifically mentioned." *Luo Yu Jie v. Liang Tai Knitwear Co.*, 107 Cal. Rptr. 2d 682, 690 (Cal. Ct. App. 2001).

Three post-IRCA changes to immigration law have only strengthened this conclusion by toughening sanctions on illegal immigration without barring back pay for undocumented workers. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (the "Welfare Reform Act"). Moreover, it is clear that when Congress wanted to restrict protections available to certain classes of aliens, it knew how to do so. For example, the Welfare Reform Act makes most aliens ineligible for "public benefits," as expansively but specifically defined by the statute, except "through the enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility." 8 U.S.C. §§ 1611(a) and (c) and 1621(a), (c) and (d). No analogous statutory provision bars or even restricts undocumented aliens' eligibility for back pay awards.

Nor does the reasoning of *Sure-Tan* preclude an award of back pay under state statutes. *Sure-Tan* was rooted in the rule that NLRA back pay orders must "expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." 467 U.S. at 900. State law, however, often allows awards beyond actual damages. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case"); *Cush-Crawford v. Adchem Corp.*, __ F.3d __ 2001, U.S. App. LEXIS 24806 at *13-*16 (2d Cir., Nov. 16, 2001) ("no one common law rule"). The significant point is that state law need not, and in some cases clearly does not, limit damages as strictly as the NLRA.

Judge Sentelle, dissenting in this case, argued that "the logic of" IRCA cuts against awarding back pay that a worker "could not lawfully earn." 237 F.3d. at 651. Such "logic," even if it had persuasive force, is not a statutory ban that preempts state law

remedies, but a factor to be considered when enforcing actual statutes: by the Board, for the NLRA; by state courts, for state statutes. While this Court can properly correct the Board if it wrongly balances competing public policies under federal law, the states' balancing of competing policies should not be overridden even if it differs from the federal balance unless federal law so requires, as it does not. Even if this Court were to reverse under the NLRA, it should not prevent states, under their own laws, from granting back pay or other appropriate remedies to undocumented workers.

CONCLUSION

For the foregoing reasons, as well as those stated by the United States Solicitor General and other amici curiae, the judgment of the court below should be affirmed.

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No. 00-1595

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IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATEMENT OF INTEREST OF AMICI CURIAE

This *amicus curiae* brief is prompted by deep concern about the difficulties encountered by immigrant workers, often among the most poorly paid and poorly treated workers in our country, when they attempt to exercise their legal rights to form a union and engage in collective bargaining.[1] Through their experiences as advocates for immigrant workers and immigrant organizing groups, *amici* have gained extensive knowledge of the ways in which unscrupulous employers can profit unfairly from the hiring of undocumented immigrants: first, by employing a group of workers who will work under conditions that their United States citizen counterparts would not tolerate, and second, by using threats to call the U.S. Immigration and Naturalization Service (INS) as a tool to make certain that conditions do not change.

Amici do not submit this brief to reargue the points already submitted to the Court and the courts below. Rather, they seek to demonstrate the devastating real-world effects — on workers, on employers who comply with the law, and on the policies set forth in our nation's labor and immigration laws — of a decision that undocumented immigrants are not entitled to back pay for their employers' violations of the National Labor Relations Act (NLRA).

The National Employment Law Project (NELP) has worked for over 25 years to advance the workplace rights of low-wage workers, including many immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has represented thousands of immigrant workers attempting to enforce their labor

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1. This *amicus curiae* brief is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission.

rights. NELP attorneys have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights legal organization founded in 1968 to promote and protect the rights of Latinos in the United States through litigation, advocacy, and education. MALDEF has a long history of advancing the civil rights of Latino immigrants, primarily in the areas of employment, education and constitutional rights.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits and the dissemination of public information. AALDEF has represented numerous clients in claims against their employers for various violations of the federal labor laws. AALDEF believes that permitting employers to avoid the consequences of labor law violations based on the citizenship status of the employee undermines the rights of all workers.

The Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) is a non-profit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change. CHIRLA's Workers' Rights Project addresses workplace justice issues through advocacy, organizing, and policy reform.

The Farmworker Justice Fund (FJF) is a Washington, D.C.-based litigation and advocacy organization for migrant and seasonal farmworkers. During its seventeen-year existence, FJF has sought to enforce and enhance farmworkers' rights in the

areas of immigration, labor and employment law, occupational safety and health, women's issues and access to legal services.

Florida Immigrant Advocacy Center (FIAC) is a non-profit agency with the mission to protect and promote the human rights of immigrants of all nationalities. FIAC provides direct legal representation and impact advocacy in areas of concern to immigrants. FIAC also engages in public education and the strengthening of immigrant communities. FIAC has offices in Miami, Fort Pierce, Immokalee, and Krome Detention Center. Additionally, FIAC, with others, formed the Florida Immigrant Coalition in December 1998 and coordinates the Coalition. The Coalition is a network of more than 25 groups working together for fair policies for Florida's immigrants.

The Illinois Coalition for Immigrant and Refugee Rights (ICIRR) is a non-profit, non-partisan state-wide organization whose mission is to promote the right of immigrants and refugees to full participation in our society. Together with more than 100 member agencies, ICIRR is involved in advocacy, organizing, community education and training, and service provision related to immigrant rights. As an organization that was spawned by the passage of the Immigration Reform and Control Act and a leader in current immigrant rights campaigns, ICIRR and its members have fought for fairness to immigrant workers.

The Immigration Rights Project (IRP) of the American Friends Service Committee's Central Regional office works to help create an atmosphere in the State of Iowa in which Latino immigrants can participate in the decision making process in their workplace, host community, city, and/or state. The IRP carries out a multi-faceted approach, which includes community organizing, education and advocacy efforts. It has been instrumental in developing the Iowa Immigrant Rights Network, which advocates on policy and legislative levels for immigrant rights.

The Legal Aid Society - Employment Law Center (LAS-ELC) is a San Francisco-based public interest law firm that has

advocated for many years on behalf of the interests of low-wage immigrant workers. LAS-ELC has a strong interest in the legal protections available to workers who may have a precarious immigration status, and particularly those who face employer retaliation as a result of asserting their workplace rights. LAS-ELC's litigation in this area includes cases such as *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998), the first reported federal case to hold that undocumented workers are covered by the wage and anti-retaliation protections of the Fair Labor Standards Act of 1938, and are entitled to recover punitive damages for such retaliation. As a result, LAS-ELC and the communities it represents have a strong interest in the issues implicated by this case.

The Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA) is the only organization in Massachusetts that brings together groups serving immigrants and refugees from many parts of the world of various nationalities, races, and ethnicities. Combining capacity building, technical assistance, community education, and policy advocacy with community organizing and civic participation, MIRA is committed to fairness for immigrants and to sound public policies. With 130 organizational members, MIRA is a respected state and national leader on immigrant issues.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. As a leading national voice on the rights of immigrants, NAPALC and its affiliates advocate for the fair and nondiscriminatory treatment of immigrant workers.

The National Council of La Raza (NCLR) is a leading national civil rights organization established in 1968 to reduce poverty and discrimination, and improve life opportunities for Hispanic Americans. NCLR has chosen to work toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations, and applied research, policy analysis, and advocacy on issues such as education, immigration, housing, health, employment and training, and civil rights enforcement affecting the Hispanic community. NCLR's Policy Analysis Center is the preeminent Hispanic "think tank" serving as a voice for Hispanic Americans in Washington, D.C.

The National Immigration Law Center (NILC) is a national legal support center dedicated to protecting and promoting the rights of low-income immigrants and their family members. Over the past 22 years, NILC has utilized its expertise on immigration, public benefits, and employment laws to conduct trainings, produce publications, and provide technical assistance to legal aid programs, community-based organizations, churches, clinics and social service agencies across the country. NILC also conducts litigation to promote the rights of low-income immigrants in employment, immigration and access to public benefits.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women full participation in the workplace. NOW Legal Defense's Immigrant Women Program (IWP) strives to protect and expand the rights of immigrant women and their children. The overarching goal of the IWP is enhancing the legal rights and basic economic security of immigrant women.

The Nebraska Appleseed Center for Law in the Public Interest is a non-profit, non-partisan law project committed to

equal justice for all Nebraskans. Nebraska leads the nation in beef slaughter and production, which provides employment opportunities for thousands of low-skilled workers, now mostly Hispanic immigrants. Nebraska Appleseed works to protect the legal and civil rights of these workers, through education, negotiation, legislation, and litigation.

Pineros y Campesinos Unidos del Noroeste (PCUN) is a union of agricultural and reforestation workers based in Woodburn, Oregon. PCUN represents over 4800 workers, most of whom are immigrants. Although much of its organizing is with agricultural workers who are excluded from the protection of the NLRA, many of its members work at least part of the year in activities, such as reforestation or food processing, subject to the protection of the Act. PCUN is concerned with its members' well being in non-agricultural work places. Further, PCUN is concerned that an adverse ruling by this Court under the NLRA could affect the available remedies under other anti-retaliation statutes that apply directly to agricultural workers, such as the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1985), or the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855(a) (1983).

The Public Justice Center (PJC) is a non-profit civil rights and anti-poverty legal services organization based in Baltimore, Maryland. Since 1985, the PJC has used impact litigation, legislative advocacy and public education to accomplish systemic change for the underrepresented. The PJC has represented low-wage immigrant workers in wage and hour actions, and has a Latino Legal Assistance Project that seeks to protect and expand the rights of Latinos in the State of Maryland.

The Washington Alliance for Immigrant and Refugee Justice (WAIRJ) is an alliance of organizations and individuals working collaboratively to advance the civil and human rights of immigrants and refugees in Washington State. WAIRJ pursues this mission by organizing and cultivating leadership in immigrant and refugee communities throughout Washington

State. WAIRJ has supported union organizing campaigns led predominantly by immigrant workers in a number of industries in the state. WAIRJ has also documented the chilling effects of INS raids and other enforcement activities on workers' exercise of their right to organize and assert their rights under employment laws.

Together, *amici* have many decades of experience advising and representing documented and undocumented immigrant workers attempting to enforce their labor rights. We urge the Court to affirm the decision of the District of Columbia Court of Appeals in this case.

STATEMENT OF THE CASE

In the present case, José Castro filled out an employment application and presented the required work authorization documents at the time of his hire with Hoffman Plastic Compound, Inc. In his responses on the application itself, he indicated that he was not legally entitled to work in the United States.

Mr. Castro was laid off during a campaign to organize a union at Hoffman Plastic. The National Labor Relations Board (NLRB) found that he was illegally laid off in retaliation for union activities and awarded him back pay, which ran from the time of the unlawful discharge until the time that his employer elicited from him, in the course of NLRB proceedings, that he was not legally authorized to work in the United States. *Hoffman Plastic Compounds, Inc.*, 320 N.L.R.B. 1060 (1998). The employer now contends that it is not liable to Mr. Castro for back pay for any period of time, despite its concession that it acted illegally in Mr. Castro's layoff.

SUMMARY OF ARGUMENT

In many workplaces in our country, undocumented immigrant workers toil alongside documented immigrant and United States citizen workers. Some employers hire immigrant workers with a general knowledge that some in their workforce

lack authorization to be employed in this country. Others have more specific knowledge that many in their workforce are undocumented. In the worst cases, employers seek out undocumented workers for the purpose of taking advantage of them.

If employers are unconcerned about their employees' immigration status at the time of hire, their interest in their workers' immigration status rises sharply when workers begin to assert their labor and employment rights. Employers wishing to defeat a labor organizing campaign or to deter employees from pursuing employment rights use whatever tools are at hand. These include sudden "discovery" that the workers are unlawfully in the United States. Unscrupulous employers threaten to bring in immigration authorities as a way of quelling organizing efforts.

A legal system that denies undocumented workers back pay creates a perverse incentive where it is a "reasonable" business decision for an employer to retaliate against a union organizing campaign or the filing of a sexual harassment claim by turning all suspected undocumented immigrants in to the immigration authorities. When undocumented victims of discrimination are denied back pay as a remedy for retaliation, this unlawful strategy carries no cost to employers. Employers pay no penalty for their unlawful conduct and are encouraged to continue the practice with the next group of immigrant workers.

The Immigration and Nationality Act (INA) and the NLRA share the goal of reducing employer incentive to take advantage of a vulnerable workforce. An award of back pay to undocumented workers deprives employers of the competitive advantage they gain by first hiring, and then mistreating, undocumented employees. It diminishes the attractiveness of hiring undocumented immigrants, meeting the goals of the Immigration Reform and Control Act (IRCA). It also diminishes employer incentives to discharge or otherwise retaliate against workers who wish to form a union or assert their labor rights,

meeting the goals of the NLRA and other labor-protective laws. Only if this Court affirms the NLRB's policy of providing limited back pay to undocumented immigrants can the goals of these statutes be met.

ARGUMENT

A. Unscrupulous Employers Use Threats of INS Raids to Chill Immigrants' Exercise of Their Workplace Rights.

1. Employers in many industries hire undocumented workers despite IRCA.

Because of their vulnerability and willingness to work hard in difficult jobs at low wages without complaint, undocumented workers offer significant advantages to employers, despite IRCA's employer sanctions provisions. Many low-wage industries rely on immigrant workers, both documented and undocumented.

In the large immigrant states, three out of every four tailors, cooks, and textile workers are immigrants. A majority of taxicab drivers and service workers in homes are immigrants. Panel, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 215 (National Academy Press 1997).

Many of the workers in low-wage, dangerous jobs are undocumented. In 1996 and 1997, INS inspections found that 23% of workers at Nebraska and Iowa meatpacking plants had questionable documents. An INS inspection of eighty-nine construction businesses in Las Vegas found that 39% of workers appeared to be unauthorized to work. Inspections of seventy-four Los Angeles-area garment contractors found 41% of the employees were unauthorized to work. General Accounting Office, GAO/GGD-99-33, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* 6 (Apr. 1999). Eighty-one percent of the agricultural workforce in the United States is foreign-born, and at least half of the workforce is not authorized to work in the United States. U.S. Department

of Labor, Research Rep. No. 8, *Findings from the National Agricultural Workers Survey 1997-98*, 5, 22 (Mar. 2000).[2]

In recent years, the number of undocumented immigrant workers in the poultry industry has increased, prompting the INS to deem it a major problem. *See* Lena H. Sun & Peter S. Goodman, *Poultry Firm to Help INS Monitor Workers*, Wash. Post, Oct. 23, 1998, at A18; David Griffith, *Jone's Minimal: Low Wage Labor In the United States* 157 (1993) (suggesting that poultry employers had "developed a preference for those most likely to be illegal aliens").

Many of these same industries are known for frequent violations of labor laws. In the poultry industry, following a 2000 survey of compliance with federal wage and hour laws, the Department of Labor concluded that 100% of all poultry processing plants were non-compliant with federal wage and hour laws. U.S. Department of Labor, *FY 2000 Poultry Processing Compliance Report* (2000). The violations discovered by the Department included violations of the FLSA's hours of work, overtime, child labor, and record keeping provisions, as well as non-compliance with the Family and Medical Leave Act. *Id.*

The U.S. Department of Labor has also found that two-thirds of all garment-manufacturing businesses in New York City can be characterized as "sweatshops." The competition between legal garment shops and illegal sweatshops has an industry-wide effect of driving down wages of all garment workers. *See Labor Department: Close to Half of Garment Contractors Violating FLSA*, 1996 Daily Lab. Rep. (BNA) 87

2. Analysis of preliminary data from the 2000 Census indicates that there are approximately 8 ½ million undocumented immigrants in the United States. Jeffrey S. Passel & Michael Fix, *Testimony Prepared for the Subcommittee on Immigration and Claims, Hearing on "The U.S. Population and Immigration,"* Committee on the Judiciary, U.S. House of Representatives (Aug. 2, 2001), *available at <http://www.house.gov/judiciary/passel_080201.html>*.

(May 6, 1996). Industries that employ large numbers of undocumented workers are also among the worst violators of labor and employment laws. A Department of Labor investigation-based survey of compliance in agriculture, focused on cucumbers, lettuce and onions, revealed that compliance with FLSA and the Migrant and Seasonal Agricultural Worker Protection Act in these commodities was "unacceptably low." U.S. Department of Labor, *Compliance Highlights*, 1, 3 (Nov. 1999). In suburban New York, where large numbers of workers toil in landscape and small construction, restaurants, domestic service and building cleaning and maintenance, "[u]ndocumented workers are the employees of choice in [these] sector[s] and abuses run high." Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, The Workplace Project, and The Struggle For Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407, 413 (1995).

In their consideration of IRCA, both houses of Congress agreed that employers easily abuse undocumented workers. Each house concluded that undocumented immigrants, "out of desperation, will work in substandard conditions and for starvation wages." H.R. Rep. No. 99-682(I) at 47, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662 ("Rep. No. 99-682(I)"), *cited in A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 414 n.32 (1995), *aff'd sub nom. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

Further, undocumented immigrants commonly will decline to report private or official abuse and are frequently unwilling to pursue civil claims in court. Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955, 986 (1998). The lack of availability of safety-net programs such as unemployment insurance, food stamps and welfare supplies further reason for undocumented workers to suffer workplace illegality without risking job separation. *Id.* at 993-94.

In Dallas, the Regional Administrator of the Wage and Hour Division of the U.S. Department of Labor indicates that illegal immigrant workers endure sexual harassment, denial of overtime pay and wages below the minimum federal standard because they are worried they will be deported. L.M. Sixel, *Aggressive Stance Urged for EEOC/Witnesses Describe Abuse of Immigrants,* Houston Chron., June 23, 1999, *available at* 1999 WL 3997076.

Thus, employers who hire undocumented workers gain a significant initial advantage of a workforce that is willing to work hard, under poor conditions and for poor wages. The workforce will, as well, suffer illegal conditions that lawfully present workers would contest. Additionally, immigrant workers have good reason to fear retaliation by their employers.

2. Retaliatory threats of INS raids are common when workers seek to enforce rights under the NLRA.

Many employers hire immigrant workers with a generalized knowledge that some in the workforce may be undocumented. Others have very specific knowledge that particular workers are undocumented. Still others seek out undocumented workers for the very purpose of taking advantage of them.

Whatever the initial degree of an employer's interest in a worker's immigration status, that interest rises sharply when workers begin to organize a union. In such cases, instances of retaliatory threats or actual reports to the INS are common. As shown below, the temptation to engage in this form of retaliation is overwhelming, given that it has no cost to the employer.

The NLRA expresses our national policy that all workers be free to exercise their right to organize and bargain collectively through representatives they choose, without interference or retaliation by their employers. 29 U.S.C. § 151 (1994). The law further provides that employers may not retaliate against workers who exercise these protected rights. Employers may not directly

retaliate by threatening to fire or firing workers. Nor may they use the INS to retaliate indirectly. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984). The protections of the law extend to all employees, regardless of their immigration status at the time the work was performed. *Id.* at 895.

In spite of the protections in labor and immigration laws, undocumented workers are extremely vulnerable to anti-union pressure from employers. An employer who is adamantly opposed to recognizing a union may discharge immigrant union supporters or threaten to turn workers over to the INS if they seek to organize themselves into a union. Unfortunately, threats and actual retaliation against undocumented immigrants are a common occurrence for immigrant workers and their U.S. citizen co-workers.

Sure-Tan itself is the best-known example of this retaliation. There, five of seven eligible voters in a successful union election were undocumented. The employer knew of the workers' undocumented status at least several months prior to the union election. Two hours after the workers voted in favor of union representation, and cursing the workers for having voted for the union, the employer questioned them about their immigration status. He then turned the workers over to the INS. *Sure-Tan,* 467 U.S. at 886-87.

While *Sure-Tan* may be the most well known example of employer retaliation, it is not a unique one. The scenario of employer retaliation and misuse of the immigration laws presented in *Sure-Tan* has been repeated across the country, in many industries:

Victor Benavides began working as a boiler mechanic in 1990. Before he was hired, the president of the corporation personally interviewed Mr. Benavides. Mr. Benavides told the president that he was working unlawfully in the United States. The president responded that he needed only a "legal" name so that Benavides could be listed on the company's books. Several

months later, when Benavides and another undocumented worker, Alberto Guzman, became active in a union organizing drive, and in an atmosphere of "flagrant and pervasive unfair labor practices," the workers were fired. One day after the union won the election, the employer asked the INS to investigate the legal status of its employees. The Board found in favor of the employees and made a limited back pay award to Benavides and Guzman. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 409, 415 (1995), *aff'd sub nom. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

Rodrigo Romero is a native of Belize. He worked in the warehouse of a Los Angeles department store for seven years. His employer knew of his undocumented status, and had, in fact, referred him to an immigration lawyer to gain legal residency. During an organizing campaign, he was pressured to vote against the union and reminded of his tenuous status. Romero voted in favor of union representation at the plant. The next day, he was fired, ostensibly because of his undocumented status. Nancy Cleeland, *Unionizing is Catch 22 for Illegal Immigrants' Jobs: Undocumented Status Makes Them Vulnerable to Workplace Retaliation*, L.A. Times, Jan. 16, 2000, *available at* 2000 WL 2201447.

In 1999, workers at a Holiday Inn Express hotel in Minneapolis voted to join the Hotel Employees and Restaurant Employees union. A call to the INS by the employer resulted in the arrest of eight members of the union's negotiating committee. T. Alexander Aleinikoff, *Illegal Employers*, Am. Prospect, Dec. 4, 2000.

In 1996, the Teamsters' and United Farm Workers' unions began a joint organizing drive in Washington State's lucrative apple industry, beginning with a packing company in Wenatchee, Washington. One employee, Mary Mendez, quotes the employer's anti-union consultant as having told the workers: "there hasn't been a union here yet, and the INS hasn't done any raids. But with a union, the INS is going to be around." The

union lost the subsequent election, but the NLRB issued a bargaining order because of the company's many illegal actions. David Bacon, *Immigration Law – Bringing Back Sweatshop Conditions*, Nov. 10, 1998, *available at <http://www.igc.org/dbacon/Imgrants/11sanctn.html>* (documenting similar employer abuses in a maintenance company in the Silicon Valley of California, a knitting company on Long Island, and a video company in San Leandro, California).

In 1994, workers in a Chicago Italian restaurant sought to join a union. At an employee meeting, the general manager told the workers that the INS could visit the restaurant. *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767, 772 n.7 (7th Cir. 2001).

Aida Naranjo was hired in 1985 to work for a Brooklyn textile manufacturer. In 1991, after voting for union representation from the International Ladies Garment Workers' Union, she was laid off. The Board found that the rights of Ms. Naranjo and other workers were violated when the employer made implicit threats, shortly after the union election, to report all of them to the INS in retaliation for their support of the union. *Impressive Textiles*, 317 N.L.R.B. 8 (1995).

In *Impact Industries, Inc.*, 285 N.L.R.B. 5 (1987), *remanded*, 293 N.L.R.B. 794 (1989), an Illinois aluminum and zinc die casting manufacturer contacted the INS after being informed that 99% of the Mexican immigrants in his employ supported the union. He secured interviews of each employee by the INS, spreading fear among the workers. In its finding of a pervasive anti-union climate, the Board said that the employer "viewed the INS program as a handy convenient way to rid itself of a bloc of union-supporting employees." *Id.* at 37.

Claudio Quijada worked as a janitor for a building maintenance company in White Plains, New York. He contacted the Service Employees International Union in October 1989 to organize the workforce. About a week later, when he went to pick up his check, a company manager told him that if he did not withdraw his support for the union, he would be reported to

the Immigration Service. The employer threatened to report another employee to INS because her brother refused to give false testimony at the employer's behest. The Board found in favor of the employees. *Accent Maintenance Corp.*, 303 N.L.R.B. 294, 296 (1991).

Emme Loy was involved in an organizing drive at a bakery in Brooklyn in 1988. His employer threatened to close the bakery and tear up any union cards given to him. Further, he informed the workers that the union was "not for illegals." *Breakfast Productions, Inc.*, 293 N.L.R.B. 607, 609 (1989).

Similar examples abound, both before and after the passage of IRCA. In 1977, Hilda Niz worked at a California tire company. She complained to the company general manager that her son, who also worked there, had not received overtime pay due him. In response, the manager said that if Ms. Niz complained to the Department of Labor, he would have her killed. When Ms. Niz complained, along with six other employees, six workers were laid off. Later, the employer claimed that since some of the workers were undocumented, it was not liable for back pay. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1181-82 (9th Cir. 1979).

In Chicago in 1982, immigrant workers at a tortilla factory began an organizing drive. Among many other retaliatory acts, the employer instituted a policy that workers would not be allowed to collect their paychecks unless two forms of identification, such as a birth certificate, social security card or immigration document, were shown. In the course of interrogating an employee about her union sympathies, a manager showed the employee a newspaper article about INS arrests of workers during a union organizing drive, and stated that the employer, too, could call INS. The Board found the employer threats to report workers to the INS to be unlawful retaliation and issued a bargaining order on the basis of the numerous acts of retaliation. *Del Rey Tortilleria, Inc.*, 272 N.L.R.B. 1106, 1112 (1984), *order enforced by N.L.R.B. v. Del Rey Tortilleria*, 823 F.2d 1125 (7th Cir. 1987).

In 1975, employees at a shipbuilding plant on Long Island decided to join a union. The shipbuilder threatened to have one of the workers, Juan Figueroa, a native of Guatemala, deported if he testified against the employer at an NLRB hearing. *NLRB v. John Dory Boat Works, Inc.*, 229 N.L.R.B. 844, 852 (1977). *See also Corrugated Partitions West, Inc.*, 275 N.L.R.B. 894, 897 (1985) (California manufacturer repeatedly threatened to call INS on workers who supported the union); *Sun Country Citrus, Inc.*, 268 N.L.R.B. 700, 708 (1984) (Arizona employer violated Section 8(a)(1) of the NLRA by telling workers that immigration papers would be required to vote in union election); *Caffe Giovanni, Inc.*, 259 N.L.R.B. 233, 235, 237 (1981) (restaurant made at least two specific threats to induce action by the INS against workers engaged in union activities); *Futuramik Industries, Inc.*, 279 N.L.R.B. 185, 185 n.3 (1986) (employer threatened at least 10-20 workers either on election day or shortly before with INS enforcement if they voted for union representation); *Hasa Chemical, Inc.*, 235 N.L.R.B. 903, 905 (1978) (employer's president said that if he lost the election hearing he was going to call the INS and have all the "illegal aliens" hauled off); *Viracon, Inc.*, 256 N.L.R.B. 245, 246 (1981) (where an Illinois employer threatened to report undocumented workers to INS if union won election, the Board said: "Like the fears of job loss discussed above, fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part.").

Just in the last several months, the NLRB has ruled in two cases involving employer misuse of its knowledge of workers' unlawful status. In October 2001, a California waste company was found to have committed an unfair labor practice by contacting the INS a few days after a union representation election and telling eleven union supporters they could not work until they straightened out their immigration paperwork. The Board held that the employer's immigration status inquiry

was a "smokescreen" for unlawful discharges. *Nortech Waste,* 336 N.L.R.B. 79 (2001).

In August 2001, the Board overruled a Chicago employer's objections to a union election. The employer told the Board that some of the workers who voted in the election were undocumented. It offered as proof letters from the Social Security Administration indicating that some of the workers had invalid social security numbers. However, the Board pointed out that the employer had received letters from the Social Security Administration as far back as May 1999, and had not raised any questions about immigration status until after the union election in February 2001. *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 115 (2001).

The above examples mainly involve written decisions by courts and by the NLRB. Many more complaints are made yearly that do not result in Board findings. Officials of the NLRB estimate that as many as forty-five complaints are filed yearly involving threats of deportation in the city of New York alone. Thomas Maier, *Workers Often Subject to Scare Tactics,* Newsday, Jul. 26, 2001. The secretary-treasurer of the Hotel Employees and Restaurant Employees' union, involved in the Holiday Inn Express case outlined above, says that immigration status "has come up in every single organizing campaign we've had in the last three years. In a number of our hotels, we have lost entire departments. And it really has a chilling effect on an organizing drive. People understand very clearly that if you are involved in trying to bring in a union, you put your job in jeopardy." Cleeland, *supra.*

3. Employer retaliation is also common when workers seek to enforce wage and hour, discrimination, health and safety, and other employment rights.

As noted above, employers use threats of INS raids as tools to maintain a non-unionized labor force. In addition, workers who seek to be paid minimum wage or overtime pay, have healthful work environments, or to be protected against sex discrimination or sexual harassment at work are also vulnerable to this form of abuse. The Court's back pay decision in the present case may affect employer retaliation and worker remedies under a host of other labor and employment laws.

Silvia Contreras worked as a secretary for a company that sells commercial insurance to truck drivers. In 1997, after Ms. Contreras filed a claim for unpaid wages and overtime under the FLSA, her employer turned her in to the INS. A court later awarded her back pay under FLSA. *Contreras v. Corinthian Vigor Ins. Brokerage Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998).

In *United States v. Alzanki,* 54 F.3d 994, 999 (1st Cir. 1995), *cert. denied,* 516 U.S. 1111 (1996), an employer confined her immigrant employee to the apartment, forced her to work fifteen hour days, exposed her to noxious cleaning chemicals, and refused to provide medical treatment when the chemicals caused her illness. The employer threatened her with deportation almost daily. He was later convicted of holding her in involuntary servitude.

In *Urrea v. New England Tea & Coffee Co.*, 2000 WL 1483215 (Mass. Super. 2000) an employer knew of a female employee's undocumented status and did nothing to contest it until she filed a complaint alleging sex harassment. The employer then aggressively attempted to uncover her immigration status during discovery in order to stop the prosecution of her case.

In Gilbert, Arizona, female employees at Quality Art LLC, a picture frame manufacturing company, accused their employer

of offensive and intrusive searches, as well as other harassment on the basis of sex, such as being assigned to sex-segregated positions. The employer retaliated by terminating some employees, forced some workers to quit their jobs based on the hostile work environment, and reported the women to the INS. Although INS officials said that they sympathized with the women — calling them "courageous" for coming forward — INS indicated that the women likely would be returned to their countries. Yochi J. Dreazen & Rudy Kleysteuber, *Allegations of Sexual Harassment in Arizona Put Immigration Service and EEOC at Odds,* Wall St. J., Aug. 22, 2000, *available at* 2000 WL-WSJ 3040954.

Foreign garment workers from China sued their employers in Saipan under the FLSA using fictitious names because the recruiters and employers had threatened them with physical assault and other extreme forms of retaliation. The workers were required to surrender their passports upon hire, and were told by their employers that their families in China would be arrested, physically assaulted, and/or fined if the workers complained of unfair working conditions in the garment plants in Saipan. *Does I through XXIII v. Advanced Textile*, 214 F.3d 1058, 1065 (9th Cir. 2000).

Seven employees at a Staten Island laundry plant filed a complaint with the New York State Labor Department, charging that their employer owed them $159,000 in back wages. Five days later, the INS raided the workplace, under circumstances indicating that the employer had reported the workers. Matthew Strozier, *Immigrant Groups Call for End to Workplace Raids,* India Abroad, Oct. 23, 1998, *available at* 1998 WL 11376904.

Rajni Patel worked as a janitor and maintenance person for a Quality Inn in Birmingham, Alabama. When he brought suit against his employer for unpaid minimum wages and overtime, the employer claimed that it was not obligated to pay unpaid minimum wages or liquidated damages to undocumented workers. *Patel v. Quality Inn South,* 846 F.2d 700 (11th Cir.

1988). The employer had known of Patel's undocumented status all along: in the lower court, the employer claimed that it brought Patel to the motel in order to "hide" him from the INS. *See Patel v. Quality Inn South,* 660 F. Supp. 1528 (N.D. Ala. 1987).

An undocumented farmworker on a California ranch worked for three years for less than the minimum wage. He joined with thirteen other workers in a lawsuit to recover wages owed them. The employer reported all of the plaintiffs to the INS. *Fuentes v. INS,* 765 F.2d 886, 887 (9th Cir. 1985), *vacated as moot,* 844 F.2d 699, 700 (9th Cir. 1988).

Most recently in New York City, retail grocery and pharmacy chains hired labor contractors who recruited and hired delivery workers from among an almost exclusively undocumented West African community. After working 80 hour weeks for as little as $2 an hour, the workers filed a claim under the FLSA. The labor contractors knew the workers were undocumented and had not demanded proof of work authorization at the time of hire. However, later they began gathering copies of worker passports and visas in order to intimidate and harass complaining workers. A federal district court judge granted the delivery workers a protective order and a temporary restraining order prohibiting the employers from retaliating against them by turning them in to the INS. *Ansoumana v. Gristede's*, No. 00-0253 (S.D.N.Y. filed Jan. 13, 2000) <http://*www.nelp.org/litig10.pdf*>, <http://*www.nelp. org/litig9.pdf*>.

B. Without Back Pay As a Deterrent, Employer Incentive to Hire and Abuse Undocumented Workers is High.

1. Employer sanctions provide no deterrent to employers who would retaliate.

As noted above, employer hiring of undocumented immigrants and use of immigration status as a club to defeat labor and employment claims continue unabated after IRCA. Employers have little reason to fear that INS will sanction them

for hiring undocumented immigrants, and so are free to retaliate. In fact, employers who would abuse the law can use the employer sanction system to their advantage.

The language of the verification requirements provides employers with a "gaping loophole" that they exploit by hiring aliens whom they know have presented fraudulent documents. William J. Murphy, Note, *Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy,* 17 Suffolk Transnat'l L. Rev. 165, 177-78 (1994). Under IRCA, employers are only required to accept documents that appear on their face to be genuine and to relate to the individual named. 8 U.S.C. § 1324a(b)(1)(A) (1994). This has meant that an employer can ignore documents it suspects are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker.[3] For example, as in the case of Victor Benavides, the employer can simply request that the worker supply him with "legal" documents. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. at 409.

3. In a rare occurrence, a federal grand jury indicted a Nebraska company as defendants in a conspiracy to smuggle undocumented workers for jobs in a beef packing plant, the result of a 14-month investigation that culminated in a raid in 2000. Margery Beck, *INS Adds Nebraska Beef to Worker Smuggling case,* Lincoln Journal Star, Nov. 17, 2001, at 5B. The workers, who had been recruited from Mexico by management, were promised well-paying jobs at the meat packing plant. Instead, the workers found themselves toiling in terrible working conditions at the plant, and many were not paid any of their wages. Over 200 workers were detained and deported by the INS, in the midst of a several-months long organizing drive. Deborah Alexander, *Nebraska Beef Faces Federal Indictments,* Omaha World-Herald, Dec. 7, 2000, at 6B.

Executives of a contract labor firm were recently sentenced on charges that they recruited workers who were known to be in the U.S. illegally, and used classes in asbestos abatement for this purpose. According to the Justice Department, instructors told immigrant workers to evade INS by throwing asbestos at officers before running away. *Safety and Health: Three Sentenced in Scheme to Hire Undocumented Workers to Remove Asbestos,* 176 Daily Lab. Rep. (BNA) A-8 (2001).

In the present case, there is at least some indication that the employer knew that Mr. Castro was illegally in the country at the time of hire: on his initial employment application, Castro answered "yes" to the question, "Are you prevented from lawfully becoming employed in this country because of Visa [sic] or Immigration Status [sic]?" *See Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060 n.10.

In such a case, the employer rarely risks employer sanctions, but acquires a powerful club to use against workers who attempt to assert their rights: "In effect, employers who are willing to comply just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on undocumented labor, are insulated from the law's sanctions provisions." Bosniak, *Exclusion and Membership*, at 1017.

In early studies of employer compliance with IRCA, many admitted to researchers that they accept counterfeit documents "with a wink." Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986,* 8 Geo. Immigr. L.J. 343, 375 n.273 (1994).

Even where employers fail utterly to comply with the law, average employer sanctions fines are low and rarely assessed. INS has shifted the focus of its enforcement efforts away from the workplace and towards border enforcement. In fiscal year 1999, the INS apprehended 1,714,035 aliens. Of this number, the Border Patrol made 1,579,010 apprehensions, of which 97% were made along the southwest border. I.N.S., *1999 Statistical Yearbook of the Immigration and Naturalization Service* 4, *available at <http://www.ins.gov/graphics/aboutins/statistics/enf99text.pdf>.*

By contrast, the number of warnings to employers nationwide was 383, down 40% from 1998. The INS issued only 417 notices of intent to fine employers, nationwide, in 1999, a decrease of 59%. *Id.* at 5. Between 1989 and 1993, the average employer fine under the employer sanctions provisions was only

$292. Louis Freedberg, *INS to Crack Down on Employers*, S.F. Chron., Feb. 18, 1994, at 2.

Because of the provisions of the law and the focus of INS enforcement efforts, employers have little to fear from sanctions. The risk of sanctions being levied is, in fact, so low that sanctions amount to a cost of doing business, a "reasonable expense, more than offset by savings of employing undocumented immigrants in the first place or by the perceived benefits of union avoidance." *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. at 415.

Workers, on the other hand, have much to fear from employers. Employer retaliation against workers has reached a degree such that even the INS recently admitted that the only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities or "that kind of stuff." Lori A. Nessel, *Undocumented Immigrants in the Workplace: the Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 359-362 (2001).

2. In a scheme without back pay, retaliation imposes no cost on employers.

Employers gain significant economic advantages by hiring undocumented workers. They have little to fear in the way of employer sanctions, even for knowingly hiring undocumented workers. Employers who choose to retaliate against workers who exercise their labor rights would also find, in the absence of a back pay remedy, that this is a "no-cost" strategy.

Back pay performs two functions in the NLRB administrative scheme: it is intended to remedy the consequences of an unfair labor practice, and to deter further violations. *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938). Back pay compensates victims of unfair practices by making them whole for the losses suffered on account of the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1940).

Moreover, it deprives employers of the competitive advantage they secure by acting unlawfully.

Absent back pay awards to undocumented victims of discrimination, an employer who would rather not have a union at its workplace, or who wishes to retaliate against a worker making a minimum wage or sexual harassment claim, has a perverse incentive to retaliate. Employers know that they are in little danger of sanction for lack of compliance with the law. On the other hand, a "tip" to the INS or threat to a workforce will rid the employer of the union. Finally, in jurisdictions where no back pay is awarded to undocumented immigrants, there is no cost to an employer who would violate the law. In such a case, threats to turn immigrant workers in to the INS perversely become a "reasonable" business decision.

For workers, the absence of back pay means the undocumented worker is put in a position worse than he would have held had he never made a complaint. That is, he is without a job, and without compensation for a job illegally taken from him. It is little wonder, therefore, that workers do not complain about illegal acts.

3. If left unremedied, employer retaliation against undocumented workers chills all workers' rights.

As this Court has previously recognized: "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976).

The impact of employers' unlawful conduct is felt not only by undocumented workers themselves, but by their co-workers as well. Documented workers and U.S. citizens may be reluctant to organize their workplaces because threats to turn workers over to the INS, properly timed, can undermine the election

process. Deportation of their undocumented co-workers will dilute the power of their bargaining unit, if it survives a union election.

Further, employers' violations of the NLRA, and other laws, may never come to light because of undocumented workers' fears of exposure. Such a result does damage to the retaliation protections in the laws and the entire remedial scheme. As this Court has said in another context, employee complaints "may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 359 (1995). Complete freedom to make complaints without fear of retaliation is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951).

The inability of undocumented workers to make complaints and secure effective remedies takes on added significance in a system that relies on complaints. The NLRB has no authority to conduct investigations on its own. "[I]mplementation is dependent 'upon the initiative of individual persons.' " *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967). Thus, when workers, fearing retaliation, fail to make complaints, unscrupulous employers profit. Both documented and undocumented workers suffer. In addition, the efficacy of the NLRA is undermined.

CONCLUSION

Congress passed the employer sanctions provisions of the Immigration Reform and Control Act as part of its strategy to "remove the economic incentive which draws [undocumented] aliens to the United States as well as the incentive for employers to exploit this source of labor." H.R. Rep. No. 99-682(I), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5656. Thus, Congress intended that enforcement of NLRA provisions would support the IRCA's purpose of reducing illegal immigration by focusing on the employer's unlawful actions. Back pay remedies, to the extent they "depriv[e] employers of any competitive advantage they may have secured by acting unlawfully," complement the purpose of the IRCA to protect U.S. labor markets from the effects of illegal immigration. *NLRB v. A.P.R.A. Buyers Group, Inc.*, 134 F.3d at 55.

One observer has posed the question before the Court as one of incentives. Which of the two is more likely to take advantage of the system: Employers, in a system where undocumented workers who suffer illegal discrimination can receive no remedy? Or employees, in a system where undocumented workers may collect back pay for a reasonable time following anti-union discrimination? John L. McIntyre, *What Does "Lawfully Entitled to be Present and Employed" Mean to You?: Undocumented Workers & Make-Whole Remedies under the NLRA*, 22 U. Haw. L. Rev. 737, 762 (2000).

That question is answered by the dissent of Judge Cudahy in *Del Rey Tortilleria v. N.L.R.B.*, the only circuit court decision denying compensatory damages to undocumented employees suffering violations of their labor rights by their employees:

> Illegal aliens do not come to this country to gain the protection of our labor laws. They come here for jobs. They can find jobs because they are often willing to work hard in rotten conditions for little money . . . When we deny back pay to illegal aliens, we tell employers to hire more of them; for aliens

> who cannot claim monetary damages for unfair labor practices are less expensive to hire and less trouble than their native counterparts.

Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1125 (7th Cir. 1992) (Cudahy, J., dissenting).

The Board's remedy of limited back pay to undocumented victims of discrimination is the only countervailing force weighing against the incentive and economic advantage outlined in this brief. If the complementary policies of the NLRA and IRCA are to be given effect, this Court must endorse this remedy so that employers will know that the practice of threatening their workers with deportation has monetary consequences. Limited back pay such as that afforded Mr. Castro in this case also inform undocumented workers that U.S. labor laws protect them, not only on paper, but in reality.

Amici respectfully urge the Court to affirm the decision of the District of Columbia Circuit in this case.

Respectfully submitted,

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